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ENVIRONMENTAL AUDITS

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

THE REVIEW OF ACTIVITIES BY THE FEDERAL GOVERNMENT CONCERNING INDIVIDUALS OR ORGANIZATIONS VOLUNTARILY SUBMITTING TO ENVIRONMENTAL AUDITS

OCTOBER 30, 1997

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C O N T E N T S

ENVIRONMENTAL AUDITS

THURSDAY, OCTOBER 30, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:32 a.m. in room 106, Senate Dirksen Building, Hon. John H. Chafee [chairman of the committee] presiding.

Present: Senators Chafee, Inhofe, Bond, Baucus, Sessions, Lautenberg, and Allard.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. OK, we'll get started.

I want to welcome everyone here this morning. Everybody please take a seat.

The purpose of today's hearing of the Committee on Environment and Public Works is to receive testimony on the topic of environmental audit legislation. This is a topic that we touched on during the hearing the committee held in June on enforcement issues.

At the outset, it might be useful to briefly describe what environmental audit laws do. Audit laws typically include one or both of the following features: An evidentiary privilege against disclosure of information discovered in the course of an audit, that's one part of it; and some form of an immunity from criminal or civil fines or penalties from any violations discovered, disclosed or corrected incident to an audit.

It's timely to hear about developments on environmental audits. While there is no legislation currently pending before this committee on this topic, two bills have been introduced in the Senate, and we'll hear from the sponsors of each bill. Senator Kay Bailey Hutchison of Texas sponsored S. 866, the Environmental Protection Partnership Act. It's my understanding she will be joining us shortly to discuss her bill. The approach in Senator Hutchison's bill is to create a privilege and immunity under Federal law.

We will also hear from Senator Mike Enzi of Wyoming, whom we welcome here today. Yesterday he introduced the State Environmental Audit Protection Act. Senator Enzi, during his service in the Wyoming State Senate, was the principal sponsor of Wyoming's environmental audit law. The approach in Senator Enzi's draft bill is to create a safe harbor for qualifying State audit laws that would prevent Federal interference.

We look forward to the testimony from both Senators, and we welcome them as they come before us.

State legislatures have been very active on environmental audit legislation. Since 1994, which is after all, only 3 years ago, approximately 24 State have enacted legislation that either establishes a privilege for information discovered during an environmental audit or provides some form of an immunity from violations of laws discovered during an audit.

Some States provide both a privilege and an immunity. I note the two States that have enacted legislation most recently on environmental audits are Rhode Island and Montana. Today, we will hear from representatives from Texas and Colorado on the topic.

It's apparent from the testimony this is a controversial topic. EPA and the Department of Justice strongly oppose the creation of any Federal audit privileges or immunities. Further, they oppose Federal or State action to enact such privileges. EPA believes its administrative policies, which feature discretionary penalty reductions in immunities, are a success and provide sufficient incentives for regulated entities to conduct audits.

EPA recognizes that despite its policy position, 24 States have acted. EPA has therefore adopted a legal position on the minimum requirements of a State audit law, where a State also enforces a delegated Federal statute, such as the Clean Water Act. This is a position that's caused tension between EPA and many States. Mr. Herman, head of EPA's enforcement office, will present EPA's views today.

We will also hear from a representative of the business community to describe why Federal legislation is needed on the topic. Why the States that have acted to create audit laws and what they advise Congress to do to make State audit laws work better.

We will also hear from a representative of a group of over 120 organizations and individuals who oppose the creation of statutory audit privileges or immunity.

So I look forward to hearing from our witnesses.

I just saw Senator Baucus. He'll be here shortly. We're going to start. Senator Inhofe, do you have anything you wish to say?

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. I do, Mr. Chairman. I'm glad you're having this hearing. I'm glad that Senator Enzi is introducing this bill.

Voluntary environmental audits are fast becoming one of the best tools to identify and eliminate the violation of our environmental laws. All too often, the EPA has adopted an attitude that is adversarial to industry, and it's been a great concern to me in all of our subcommittees, and particularly my Clean Air subcommittee.

I understand that EPA does have a policy regarding environmental audits. However, I do not think it adequately addresses the current concerns of most business. For a voluntary environmental law to be truly effective, participants must have assurances that full and honest disclosure will not result in massive fines and years of litigation due to lawsuits from the Federal Government and outside organizations.

My first concern revolves around the core mission of the EPA. I believe that the EPA should, above all else, work to ensure that environmental laws are being complied with. Instead, the EPA would rather focus their money and efforts on enforcement and issuance of penalties.

I have told the story many times, and I feel moved to tell it one more time, Mr. Chairman, about our Brandon Mill Creek Lumber Company, the phone call I got the last year I was in the House of Representatives. Here was a lumber company that was a third generation lumber company, very competitive. He called up and said, you know, they've put us out of business. I said, who has? He said, the EPA.

I said, what did you do that was illegal? They said, well, I don't think we did anything. We've been selling our used crankcase oil to the same contractor for the last 10 years. That contractor is licensed by the Federal Government, by the County of Tulsa, by the city of Tulsa, and yet they've traced some of that oil to the Double Eagle Superfund site.

He said they had a letter, that he read to me over the phone, that any normal person would say they're going to invoke fines of $5,000 a day to this individual. Well, when you read it real carefully, you can see they say, that's our intention, we are authorized to do that, we intend to do that. But they don't commit.

So I wonder, so often, we're able to stop it. But how many people think to call their Congressman, how many people that don't do it out there. Right now, we have a company in Oklahoma that has a way of recycling CFCs. They're saying, no, we have to incinerate them. Yet, when you incinerate them, more of the CFCs get into the air than they do when you recycle them.

So it just seems to me that we have an agency that is constantly harassing the private sector, those who are employing people and paying taxes. I applaud you in introducing this Act. I think this is a way that might instill some kind of confidence and working relationship between the EPA and industry.

While I can't stay for the whole hearing, we're having an Indian Affairs hearing, where we have the new director designated for the BIA, and I have to be there, Mr. Chairman. But I will be very much interested in following this legislation.

Senator CHAFEE. Thank you, Senator.

Senator Bond.

OPENING STATEMENT OF HON. CHRISTOPHER S. BOND, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Thank you very much, Mr. Chairman.

I, too, we have a couple of conference committees going on, so I'm going to have to leave fairly shortly. I would advise you that one of our witnesses, Mr. Paul Wallach, is a fellow car pool dad, and friend of mine. So I have not had a great opportunity to speak about environmental matters with him, but we do follow sporting events and other educational activities, much more significant things.

But this is a very significant hearing, Mr. Chairman. When we approach this issue as we approach other issues, the objective of this committee ought to be, how can we do the best job of cleaning

up the environment. Senator Inhofe has just pointed out a problem that he's encountered in Oklahoma. I can tell you a horror story in Missouri.

One of our major manufacturing companies in Jackson County, MO, just east of Kansas City, voluntarily audited its operations, found an environmental problem, worked it out with the State of Missouri so that they could cleanup and take appropriate measures and pay the appropriate sums. They thought they had an agreement, and then the EPA comes in and over-files and wants to fine them more.

I am hard-pressed to explain, and maybe some of the witnesses later on can explain to us, how that is not only going to assure cleaning up the environment in this particular instance, but what impact is that going to have on future activities. Aren't we all about cleaning up the environment? If we are, is there a reasonable grounds, is there a reasonable basis for proceeding in this area to assure that somebody who is willing to take the initiative, a company that finds out it has caused pollution, how they can deal with that problem and not be subjected to stiff penalties.

So I think the testimony today is going to be very important. My staff will be following it closely and I will be following the record. I know the Missouri General Assembly has been unable to pass a decent legislation. I would hope that we could hear out all sides and figure out how we achieve the objective of assuring a cleaner environment.

Thank you.

Senator CHAFEE. Thank you, Senator.

Senator Sessions.

OPENING STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Chairman, thank you very much.

I applaud Senator Enzi for his insight and effort to improve the environment. I certainly believe that is the intent of this bill. It ought to be the situation in this country that if someone finds an inadvertent error in their activities that they could report those errors without serious consequences raining down upon their heads. In so allowing them to do, we ought to thereby improve the environment by encouraging companies and individuals who may have violated pollution laws to come forth and correct that problem.

As a prosecutor for quite a number of years, I have been troubled by the proliferation of criminal law in America. For hundreds of years, the law on robbery was, whoever takes property by force and violence from the person of another is guilty of robbery. That's all it said. That sufficed for hundreds of years.

Now we draw crime bills that are hundreds of pages, involving one minor area of law. I think what we're seeing in this bill is an attempt to deal, to mitigate some of the unintended consequences of strong environmental law.

But I say, at least what concerns me, Mr. Chairman, is the possibility that we will so muddle the law and add so many confusions with it that it becomes even less clear than it is today.

I think the goal is good. I look forward to working with this legislation to see if we can do it. But I also believe that when we pass

a criminal law in this body, it ought to meet the classic goal or requirements of a good criminal law. It ought to be clear, it ought to be enforceable. Nobody ought to have doubts about when they're violating the law and when they're within the law.

I think this Congress over the years has gotten away from that principle. It's something that I'm concerned about. I just want to review this legislation with that in mind.

Senator CHAFEE. Thank you, Senator.

Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Mr. Chairman.

First of all, let me say that I think environmental audits are a good idea. It's pretty hard to be against environmental audits. They increase compliance with the law, and as a result, they improve the quality of our air and water.

At the same time, I'm skeptical about the need for Federal legislation that would prevent information gathered in an environmental audit from being disclosed to the public. Our legal system is based on the principle that when a law enforcement investigation is underway, as the Supreme Court has said, "The public is entitled to every person's evidence." It's an important element of the public's right to know.

I don't see why we should create a special exception for environmental laws, compared to employment discrimination laws, antitrust laws, immigration or work place safety laws. To my mind, the toughest issue involves the Federal-State relationship. As a general matter, our Federal environmental laws do not and should not require States to always march in lockstep to the beat of the Federal drum. Within limits, they can reach different conclusions. States can experiment.

However, at some point, a State environmental audit law may undermine State law enforcement efforts to such an extent that the States enforcement system is inadequate. If we allow that to happen, we won't have a level playing field. That would threaten to undermine the progress we have made in protecting the environment over the last 25 years.

I look forward to addressing these issues during our hearing.

Senator CHAFEE. Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman.

I listened with great interest, I have respect and a good relationship with the Senator from Wyoming. Therefore, I listen when he says something or proposes something.

But frankly, as a former CEO of a very good-sized company, a company involved in financial recordkeeping, a company I left, had 16,000 employees when I left there, and I was one of those who started the company. So I know something about audits, etc. They're necessary to keep things in proper perspective.

So I will challenge the notion that those who make mistakes, those who commit an error have innocently done so, that we should

rely on the good will of people to fix problems when it affects their neighbor, that we are, I remind everybody here, a Nation of laws, as initially constructed. Laws. That's what we're about. It's not to curb behavior. It's to make sure that no one steps on other people's rights.

That's the purpose. Everybody should be treated the same.

So as I look at this, Senator Enzi, I have some questions and I hope we'll be able to resolve them. Some in favor of audit privilege law, they talk about helping the environment, they talk about requests from the States for non-regulatory approaches to environmental protection. Many State governments likewise talk of building partnerships with their business community to address their environmental concerns, trying carrots instead of sticks.

But I'm concerned that the legislation we're considering will help encourage a race to the environmental bottom when it comes to such issues as State enforcement of environmental protection laws, allowing a privilege status to environmental audit reports and material related to such reports. I think it sends us in that direction.

There have long been calls for new approaches to environmental regulation other than enforcement, and command and control legislation. Voluntary incentives sometimes do work. I would hope we wouldn't put our income tax system in voluntary compliance.

I am particularly proud of my contribution, alternative approaches to environmental protection law, embodied in a piece of legislation I offered called the Community Right to Know Law. Under that law, polluters are only required to disclose to the community what they're releasing into the air, sent out as trash or dump into the waterways.

Because companies would rather not have to publicly explain the content of their toxic emissions, many companies have proactively changed their environmental behavior. They have changed environmental protection from an end of the pipe cleanup process to a pollution prevention process.

As a result, industries have reduced toxic emissions in some cases, on average more than 40 percent since 1988, voluntarily. But the key to the success of the law is that the people in the community, those most immediately affected by the pollution, have a genuine right to know. They have a right to know what pollution is being discharged in their community. It's their right.

However, audit privileges go in the other direction. They will turn what is now a right to know into a right to keep secrets, potentially toxic secrets. This proposal, I believe, could frustrate investigations of environmental wrongdoings with illegal maneuvering that have no place in protecting our environment.

Companies could keep secret needed information about how their actions may contaminate a local drinking water well. They could keep secret potential crimes from the public and employees.

I don't know, I haven't heard any examples of companies that have stepped forward and said, you know what, we poisoned the town's well. I haven't ever heard that kind of good will coming. I've heard at a later date that some companies have tried to clean it up. But why shouldn't the public have the right to know?

Contractors and others working at a factory would not be free to talk about what's going on. While the Supreme Court has said that

we cannot limit spending on political campaigns, because money is equal to speech, in the environmental area, we're saying corporate polluters will now have the right of concealment.

In Idaho, a surprise State inspection of a Federal lab run by Lockheed Martin found illegal handling of toxic wastes. As the State inspectors left the plant, they were given files and told they were privileged under State audit law. Is it not surprising that the State of Idaho let their audit law sunset?

EPA has an audit policy that encourages audits without limiting risks to environmental protection. It waives certain penalties but does not allow companies to have an unfair advantage over their competitors.

I believe in States having flexibility in implementing the Federal environmental laws. But those States that put the polluter ahead of the public should lose their authority over those environmental statutes authorized to them.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator.

Senator Enzi, we welcome you, and I know you've had a long interest in this. This hearing came about because, as I recall, you were moved to add this as an amendment, and I indicated to you that we would have a hearing. Therefore, you are gracious in cooperating with us and we now have this hearing. We welcome you.

Senator Kay Bailey Hutchison might be along. If she is, we'll put her on at that time. But you go right ahead, Senator, and again, we're pleased to have you here.

STATEMENT OF HON. MICHAEL B. ENZI, U.S. SENATOR FROM THE STATE OF WYOMING

Senator ENZI. Thank you, Mr. Chairman and members of the committee. I really appreciate your holding this hearing.

The opening statements were very interesting to me. I'm glad to know that you're open to the possibilities that there are for the environmental audits.

For years, many of us have been concerned about making the environment cleaner, safer and healthier. For two and a half decades, the EPA has been cleaning things up. But there is still lots to do. We've got to get more people involved. We're not going to get all of the problems until everyone is involved.

I come from a small business background. I've worked in a variety of business sizes. I serve on the Small Business Committee. I need to tell you that my opinion of a small business is one where the owner of the business sweeps the sidewalks, cleans the toilets and waits on customers. I'm talking about really small.

If we design things so that the small business can handle them, other businesses don't have any problem. Unfortunately, there are a lot of small businesses out there that view the EPA more like the IRS. They have questions they'd like to ask, but they're afraid to. Yes, I'm talking about small business. Big business has staff and specialization that allows them to get answers. In fact, big business can act through their attorneys and even have some lawyer-client privilege.

Several years ago, I watched Oregon craft a solution. Shortly afterwards, I saw Colorado do something similar, but different. I

was in the Wyoming legislature at the time, and I watched these two pieces of legislation for a couple of years to see what results they would get, and to see if there were any court challenges.

The legislation worked and there were no court challenges. A couple of other States copied one or the other of the laws. I combined the two laws for a bill for Wyoming.

I took that bill through the legislature. The bill was unanimous out of committee. It passed both houses by more than a two-thirds majority, and was signed into law.

As you know, that's a lot of steps and a lot of public input. There was a consensus, not only did people have a chance to get involved in the process, but the debate itself raised important, raised the importance of a cleaner environment. It forced people to focus on the fact that our objective is to have a cleaner, safer environment. That's not an emphasis on levying big fines.

This winter, when I got to Washington, several States with audit laws were meeting with the EPA. Since I had been involved in the drafting and passage of one of these laws, they met with me. The EPA was using threats of over-filing and delaying approval of State enforcement programs.

Of course, over-filing means the EPA could come in and use the audit information as a road map for prosecution and levying fines. They can do this even after a person has conducted an audit according to State law. After a business has gone through the expense and exposure to be sure that they are not harming the environment. The EPA was sounding like the IRS.

So how do we encourage especially a small business to spend extra money looking for environmental problems and then also expect them to pay for the cleanup of the problems if they find them? Twenty-four States have found that all you have to do is take the fear out of the effort. A small business doesn't want to go to all the expense of checking for problems, and then all the expense of cleaning up problems if the reward is simply fines and penalties, and especially the rumored fines and penalties of the EPA.

Have you ever heard of a small fine from them? Small business people never have, particularly in relation to the size of their business. To a small business person, a small EPA fine would seem huge. They have just as much fear of the embarrassment. What if their neighbors think they have been polluting? They have to worry about what others in the community think of them. Their reputation is what holds their businesses together.

I want to thank you, Mr. Chairman, and the Environment and Public Works Committee, for holding this hearing. Because it deserves congressional attention. To date, 24 States have chosen to enact some form of environmental audit law. Legislation is pending in 16 other States.

I would point out that 11 members who sit on this committee come from States that have audit laws. Another five members come from States that are considering audit laws. I don't want to spend a lot of time explaining the intricacies of the laws, because you have an expert panel of witnesses here today that can do a good job of that.

How do you ease people's fear of the EPA and get them to clean up the environment at their own cost? You simply assure them

that they won't be fined in addition to their personal effort. You assure them that they don't have to turn over any more of a road map of their problem than the law already required. Protection of voluntary gathered information. Material that wouldn't have been available if it weren't for the audit.

If they don't do the audit, these materials are not available. We don't protect bad actors. We don't protect repeat offenders. We don't protect people that have had an environmental accident. A carefully crafted audit law, and that's what you get the excitement of working on, assures that the audit protections apply only to good faith efforts, efforts that are voluntary, that are above and beyond what is otherwise required by law.

People conduct audits to find things they do not already know about. There are examples from the existing audit laws of multiple audits by the Environmental Protection Agency themselves that missed things that were found in their own audit.

Entities that conduct audits can include businesses, but they also include schools, hospitals, towns and counties. Any disclosures are a net gain above the traditional enforcement. They are a net gain for a safer, cleaner and healthier environment.

Now, audits do cost money. If a violation is found, it costs to clean it up as well. Because if you're under an audit process, and you don't clean it up and you know about it, it's a criminal activity. That's more pressure on the businesses. Once they report it, without audit protections, they can be fined and even taken to court.

So in deciding to conduct an audit, a person takes on a big risk. It's big enough so that most small businesses won't voluntarily undertake it. These folks choose instead to take their chances and wait for the inspectors. After all, only 2 percent, only 2 percent of regulated entities are on inspection schedules anyway. Just 2 percent, Mr. Chairman.

How do we encourage the other 98 percent to really think about their environmental performance, when we reward them with fines?

I'd like to take a minute to explain my approach to the issue. The State laws have been working. They can work better. They need some Federal assurances. The legislation I've introduced would provide a safe harbor for State laws that fit within certain limits. It's the limits that are important. It would not give any authority to any State unless they go through the full legislative process, including all of the local discussion and debate that it entails.

This doesn't give a blanket authorization nationwide for an audit law. It requires that local debate, that local concern, the local detail and the local differences. That's a critical part of this process, and something of value that we should recognize. State legislators live in the places that the laws affect. It's their home.

This bill would allow Congress to set the boundaries of the safe harbor and determine what State laws may provide, such as limited protection from discovery for audit information. But only information that is not required to be gathered. All legal reporting requirements and permitting disclosures remain in effect and could not be covered by audit privilege.

The State audit law may provide limited protection from penalties if violations are promptly disclosed and cleaned up. Note the

protection will not cover criminal actions and the law must preserve the ability of regulators to halt activities that pose imminent danger to public health.

Third, a State law falls within the safe harbor, the EPA would be prohibited from withholding State enforcement authority or over-filing against individuals simply because of the State's audit law. Lastly, the bill would require an annual State performance report that would help measure the success of the different laws, so we can see what works and what doesn't.

I want to point out that this legislation will not dilute enforcement. There are safeguards to ensure that the State audit laws always act to supplement, not to supplant, the existing enforcement. It's important to note that. Audits are an affirmative tool. Used properly, they can only be used to achieve an environment that's safer and healthier than the status quo. They do not protect any entity from regular inspection or monitoring.

Some form of Federal legislation is necessary to provide the certainty our State laws need in order to be effective. I think it's a tragedy that the EPA has been so obstructive in giving States a chance to test reasonable and innovative solutions to a cleaner environment. Instead of promoting reinvention that the EPA talks about, the EPA is perpetuating an environmental race of mediocrity.

I'd like to close by telling you how Wyoming's law has weathered the process. I'm pleased to report that in the last couple of months, after many delays, the EPA has been into the State and taken a look at our law. I've been pleased with the comments that they've made on it and the ability that we have to continue to use it.

At least that's what they tell us today. They just might change their minds tomorrow and decide to over-file against Wyoming people who use it. So it's no wonder that people are afraid to use the law. It's time we put this issue to rest by defining some level of a safe harbor, some level, in giving State laws the certainty they need to be effective.

I'd encourage the members of the committee to take a look at this bill and see if they can find a reasonable solution that will assure a cleaner and healthier environment.

Thank you, Mr. Chairman and members of the committee.

Senator CHAFEE. Thank you, Senator.

This is a little bit complex, I must say. See if I understand it.

Currently, let's take the Wyoming situation. Currently in Wyoming, which I presume is somewhat typical, you have an audit law. Does that apply in those areas where the Federal Government has given the enforcement procedures to the State, as in the Clean Water Act, for example, in many instances?

Senator ENZI. Yes, it does.

Senator CHAFEE. But the reason you're coming before us now, after all, if Wyoming's situation is working well, and Colorado or whatever it is might be working well, you're saying that you want Federal legislation in order to prevent over-filing, is that it? Is that why you're here?

Senator ENZI. They're not working well only from the aspect that people are afraid to utilize the law, because they're not sure what the status will be of EPA intervention in their law.

Senator CHAFEE. I see.

Senator ENZI. They're not going to hang themselves out by going to all this work and all of this cost and then have the EPA say that it wasn't worth anything, that they have to go ahead and levy the fines on them.

Senator CHAFEE. Because under the current situation, even though you have a Wyoming law, for example, and the business owner conducts and audit and discovers that he's made some mistakes, and addresses those mistakes, you're saying that despite the Wyoming law, the EPA can still come in on top of that business man and subject him to fines.

Senator ENZI. Yes, Mr. Chairman, that's the threat that was brought to us in January that got me involved in this issue again. Several of the States were here for a meeting, and that's exactly why they were here.

Senator CHAFEE. We're going to hear from Mr. Herman from the EPA. It's my understanding, obviously, that EPA opposes the State protection laws. But as I understand, they've issued some guidance that details minimum standards that a State audit law must protect to gain the approval of EPA. So it seems to me they're working both sides of the street, as I understand it. We'll hear from Mr. Herman on that.

One of the questions that's going to be raised here is, why do you restrict it to environmental laws? I guess Senator Baucus or maybe Senator Lautenberg said, what about the Internal Revenue laws?

Senator ENZI. I haven't taken a look at it from that aspect yet, but it might be a good idea.

Senator CHAFEE. Well, I suppose you've bitten off enough.

Senator ENZI. In Wyoming, we're limited to one topic per bill.

[Laughter.]

Senator CHAFEE. Well, I think they were talking, I think Senator Baucus listed several items, several areas where this might apply but yet has not been addressed.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

This is an interesting subject. I think it was in 1975 when Congress codified the Federal Rules of Civil Procedure. A question arose as to whether we should codify privileges to a general rule and all evidence that's relevant or could lead to relevant evidence is admissible, and the public has a right to know of it.

Congress decided not to codify those privileges, as, say, the attorney-client privilege. Because Congress felt that since evidentiary rules, including exceptions to the rule and its various privileges, was developed really through the common law, that it should be left that way and left to the courts to interpret and decide what evidence is properly admissible and what is not.

In fact, interestingly, on the subject that the chairman raised, IRS audits, for example, it's not directly on point, but I think the Supreme Court has ruled that there is no work product privilege between a taxpayer and an auditor and an accountant. That is not privileged information.

The question also does come up, as the chairman said, what about all these other areas? Why should environmental audit information be privileged when virtually all other information is not

privileged, civil rights or employment discrimination laws, OSHA for example, that's not privileged.

I'm not so sure, frankly, that companies that are going to audit much more than they currently do if this law were passed. I think companies are going to audit because it's in their own self interest to conduct these audits, to find out whether they're doing it right anyway.

Obviously, too, our environment's been cleaned up quite a bit in the last 25, 30 years since we passed major environmental laws. As you know, one of the premises, underlying assumptions of our Federal environmental laws is that they are Federal laws, they are national laws, Clean Water Act, Clean Air Act, etc. But a lot of States do have some flexibility, because each State is a little bit different.

That assures the country that a person traveling around the country is going to have virtually the same environmental protection in whatever State he or she might be in. It also prevents States from gaming the Federal statute by enacting certain weaknesses to attract industry or what-not. It's worked pretty well. Nothing's perfect, and we struggle with trying to find the right balance.

But the question I have is, what happens under your statute and bill, for example, when an attorney general certifies that a State is properly enforcing the laws but the Justice Department or the EPA have a different point of view? For example, because the State audit law prevents a State from recovering economic benefits derived from the violation, what do we do there?

Senator ENZI. In that particular case, there would be court action that would result in the opportunity for the State as well to present its case, not just the Federal.

Senator BAUCUS. But wouldn't the information be protected under your bill?

Senator ENZI. The only information that's protected under my bill is additional information beyond the Federal Government requirements. If it's required to provided at the present time, it doesn't come under privilege at all. This doesn't change Federal law. The same laws will apply nationwide that apply at the present time. So we'll still have the same uniformity of law. We'll just have an opportunity varying by State on how they can do an audit and what kinds of protection they get for the audit.

Senator BAUCUS. I understand. But does the State audit law, it prevents a State from recovering economic benefit derived from violation, that would be a significant change from general Federal enforcement of environmental laws.

Senator ENZI. The bill itself allows Congress to provide the parameters of that safe harbor, whatever that might be. The States would have to operate within those parameters then.

Senator BAUCUS. Which leads me to my final question. Isn't it really working out pretty well now? I say that because EPA looked at Wyoming's environmental audit law, and said, you know, it's OK. EPA looked at the Texas environmental audit and said woops, you've got to make a change here. Texas did make a change.

Now, maybe that's the reason for the bill, is that Senator Hutchison did not want the change. But that was an economic benefit situation.

So in certain circumstances, it seems to me it's just not necessary. It's a solution in search of a problem. Because the current system, although not perfect, certainly has lots of flexibility, which is in many ways good. Whereas on the other hand, if we lock into a statute, a provision that reduces the flexibility, but also, the real question is then what about all the parameters and guidelines that Congress would enact, and exceptions? We may be just back where we started from again.

Senator ENZI. We'd be back where we started from with one large exception, and that's that the businesses out there could rely on it. That's what happens when we codify the law. The businesses can then rely on the action that's taken. That's the missing part in the environmental audit right now, what can you rely on, will you be over-filed.

Senator BAUCUS. The logical question is, why do businesses need protection here but not in other areas?

Senator CHAFEE. That's getting back to the question of the IRS and OSHA and so forth.

Senator BAUCUS. That's right, and why not the discrimination laws?

Senator ENZI. If we want people to take an active part in discovering errors that may have been made, the more incentive you give them to do it, the more errors they'll find.

Senator BAUCUS. Thank you.

Senator CHAFEE. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

I think it may not be fair to say it's not necessary. I think Senator Enzi is suggesting that there may be a lot of even minor violations that if business officials knew that if they promptly discovered it and reported it and fixed it, they would be constantly monitoring. They may be afraid to do a lot of monitoring, because they may find some minor error that would cost them thousands of dollars. Or if they proceed in a way that would satisfy State law, they could still be penalized by EPA.

Is that the fundamental concern, that if you go in and report a problem, you pay to clean it up and stop doing it in the future, or you could still be subjected to very large fines from Environmental Protection Agency? Is that the basic problem you have?

Senator ENZI. Yes, that's correct. The businesses are afraid that if they, and when you make this step, it's a huge commitment, because you can't just do an audit and then ignore what you found. You have to pay for the audit. That costs money. Then you also have to pay to clean up anything you find.

When you start an audit, you're agreeing to do that, or you have absolutely no protection and possible criminal action. So they're taking a huge risk. They are willing to do that, if they have some assurances on the fines and penalties and in some States, they have the assurance that the additional information that they're generating themselves, to find their own problem, won't have to be shared.

Senator SESSIONS. It's really a policy decision, it seems to me, whether you think the benefits of utilizing the results of that confidential audit, I don't know if using a confidential audit against the company, the threat over them to prosecute them or otherwise

penalize them, so that they don't produce that information. It's a policy decision.

I recall, Mr. Chairman, it being discussed within the Department of Justice on the issue of defense fraud, what about large companies who discover a lower level employee of that company who's committed fraud and how we could encourage them to come forward and report that? So I don't know if laws were ever passed in that regard or not, but I know it was seriously considered a number of years ago.

I would, as I just repeated earlier, though, this is contrary to classical criminal law, though we're not dealing with classical criminal law and environmental laws. That's it.

Agencies are given authority to change the percentage of emissions that can be done. There's great dispute over whether some of these things can safely be put in a landfill or not safely be put in a landfill. So there's so much uncertainty about it. I think that gives value to your proposal.

Let me ask this. With regard to the privilege, I share that concern. Do you think there's any way that part of your bill and most of the environmental audit bills could be modified in some way, so that evidence of serious wrongdoing would not be, they wouldn't be able to withhold that from the Government?

Senator ENZI. Mr. Chairman, there is provision in there that there's no criminal activity that's protected. Withholding that would be criminal activity.

So there would probably be greater prosecution, not less. I don't know if that answers the question or not.

Senator SESSIONS. I'm not sure I read it that way. But there is language to that effect in there, and I have not studied it carefully.

The other point that would concern me, I think we've got to deal with, would be the language that says with regard to immunity, which is a serious act, to give someone an immunity from an offense, that you couldn't get immunity if the violation were intentional and willful. I think having both of those requirements is probably too strong, and I would be concerned about that.

That's something I have not studied, and would like to look at it more. Because there are some offenses, as presently written, don't even require willfulness, for example. So it may go broader than you intend, I think, in that statute.

Senator ENZI. It should probably be or, in that instance.

Senator SESSIONS. Or may solve that problem.

Senator ENZI. The immunity is from fines, not from criminal prosecution.

Senator SESSIONS. Is that right?

Senator ENZI. Yes.

Senator SESSIONS. Well, that helps me a lot. I didn't realize that. I misread that. So if that is just from civil fines or penalties, then I'm less concerned about that than if I thought it were the actual criminal offense.

Senator ENZI. There's no protection at all from criminal. That's strictly from civil. I think that every State that's passed one of these laws also has in camera reviews allowed by the judges to see if there's anything there that could have any criminal activity in it as well.

Senator SESSIONS. Well, I think that is a positive step. Because as I said, there may be instances in which it would not be appropriate to maintain a privilege on evidence involving serious criminal violation.

Senator ENZI. Absolutely.

Senator SESSIONS. Mr. Chairman, thank you.

Senator CHAFEE. Thank you, Senators.

Senator SESSIONS. Thank you, Senator Enzi, for your work. I think it's raising an important issue. I know it will take a lot of effort, and I applaud you for that.

Senator ENZI. Thank you.

Senator CHAFEE. Thank you. Senator Lautenberg.

Senator LAUTENBERG. Thanks, Mr. Chairman.

As I understand EPA's policy on audits, penalties are waived. There's really no such thing as a small fine. Penalties are waived except for economic advantages for non-compliance. So I think the specter of these egregious acts by EPA and fines and so forth is probably a little less real than as I heard the discussion going on, Senator. I don't know whether that in any way mitigates somehow or other your mistrust or your wariness about an EPA action.

What I find here is that we've said that in camera, the information can be revealed. Once again, establishing privilege for another group that must respect confidentiality.

The ones who are left out are the people who are affected by it directly. If a judge hears the case, it's in the closed environment of a private session of the court. But the people whose water supply may be affected or whose children might be endangered by an environmental condition, they're not allowed to know what's going on.

Frankly, I must tell you, and I respect what you're trying to do, if we can reduce regulation without losing the mission that we want to accomplish, that's OK with me. But I find it hard to imagine that making internal discoveries of violations of environmental rules ought to be guarded such that you can't discuss, that it can't be forced to be brought to the attention of those who are in charge.

So I again, I think we're applying an honor system differently in this case than we are in almost any other. I would ask you that, if someone violates the rules, a law, as an employee of a company, and the company manager discovers it. Are they then forced to make it known to authorities, or are they allowed to keep that quiet as a privilege? At the same time say, OK, from now on this employee is terminated or else he or she's got to change the way they do things?

Senator ENZI. I'm not sure I understand the question.

Senator LAUTENBERG. Is the manager of the company required to, are they permitted to keep this as privileged even though it was by no intent of the company's to have it done this way, illegal discharge, let's say? Are they entitled to keep that as privileged information by simply taking the corrective action in there to change what's going on within the work system without getting on with the cleanup or advice to someone that there's a danger out there?

Senator ENZI. No, that wouldn't happen. In fact, under the Wyoming law, they're required to report that they're going to do an audit. Anything discovered before that point is criminal if they don't take care of it.

So the employee reporting it to management is making management aware of an activity that's out there that they're required to clean up anyway. None of that is privileged. Of course, we're usually talking about small businesses with this. Big businesses already have their own forms of protection on it.

Senator LAUTENBERG. All right, well, small businesses can create havoc with the environment just like the big businesses if they're handling mercury or some other highly toxic material. The size of the business shouldn't determine what the outcome is. If someone uses a small gauge pistol, it causes as much danger, aimed properly, as a big shotgun. So we don't say, well, if it's small, it's excusable, the person's dead on the other end. I don't understand why a small business isn't compelled to obey sensible environmental laws. Or environmental law, let's strike that. The sensible, we can discuss that.

Senator ENZI. The small businesses do have to observe the same rules, to the same extent, with the same reporting, but with less people and less capability. They don't have the specialization, they don't have the experts, they can't afford the experts.

But they come under the same fine structure as the bigger ones. They also know that their possibilities of being inspected are probably once in 50 years. So there's not much incentive for them to do anything there. They might as well just wait and see if there's a problem, rather than take an aggressive look and see if there's a problem.

We're not talking about the environmental accidents here. What usually turns up in these laws as a result of the use of the laws is not environmental violations. What usually turns up is environmental eyesores. Not things that are illegal, just things that look bad. But there are businesses out there that are afraid to even ask about those for fear of the fines they might sustain. They know that if they wait, they may have sold the business before anybody fines it.

So what usually turns up as eyesore is not violations.

Senator LAUTENBERG. Beauty is in the eyes of the beholder, I guess, or the reverse of that.

Thanks.

Senator CHAFEE. Senator Allard.

Senator ALLARD. Thank you, Mr. Chairman. I apologize for being late.

I have an opening statement I would like to make part of the record, if I may.

Senator CHAFEE. Certainly.

[The prepared statement of Senator Allard follows:]

PREPARED STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM THE STATE OF COLORADO

Thank you Mr. Chairman. This is an appropriate and timely topic for a committee hearing. The issue of environmental audits has been at issue in the State of Colorado for some time now, with the Environmental Protection Agency attempting to force State agencies to act as mirror image of themselves instead of allowing states to try innovative compliance methods. It's always disappointing when the Federal bureaucracies fall back on a command and control approach to problems when they feel intimidated by innovation.

What is more disappointing is that EPA's rhetoric fails to match their efforts in the area of Federal facilities. If the EPA were to pursue Federal agencies who are

responsible for some contamination at a research institute at the Colorado School of Mines as vigorously as they pursue States who are trying to increase compliance with environmental laws, we would all be better off. Unfortunately, EPA appears to be more interested in controlling states than helping to clean up the environment.

To address EPA's policy toward innovative compliance policies we have an excellent group of witnesses, but I'm particularly pleased that we have Trish Bangert who is the director of Legal Policy in the Colorado Attorney General's office. She has been in the forefront of the debate on environmental audits nationwide and unlike other States, she has been key in assuring that what Colorado's elected legislature has determined is best for the State, isn't overturned by unelected Washington bureaucrats. It was Trish who in hearing before this committee last June identified the hypocrisy of the EPA with respect to its treatment of States versus the Federal Government when she said, "I cannot help but mention that EPA's fine sentiments about protecting the environment extend only to private parties, and, seemingly not to the Federal Government." It is ironic that the states EPA doesn't trust are begging the EPA to do their job against the Federal Government.

I commend the chairman for calling this hearing, and look forward to all the witnesses, but would like to particularly welcome the witness from my State.

Senator ALLARD. Mr. Chairman, I think the fundamental question here is do you want to make the small business man out there a part of the team in cleaning up the environment, or do you want to create him as an adversary and discourage him from working and trying to clean up the environment in a responsible manner.

I have some examples I can point to in the State of Colorado, where we've had self-audits. The Environmental Protection Agency, after sometimes, many times it's not always the business man. When we're talking about a small business man, sometimes it's local government. Many times it's local government. It's small communities.

We can point to one situation in Colorado. We had a small, local entity of government, local government, made a violation. They discovered it. It was an employee, a problem with an employee, as Senator Lautenberg alluded to in his question. They took the question, but then the Environmental Protection Agency comes in behind them and subjects this local entity of government to a lot of harassment and threat of serious fine after they did the responsible thing of reporting it and trying to immediately remediate it.

It's impossible for us to put an EPA employee in every small business in America. One way that you can get this is to pass some common sense legislation, like Senator Enzi and Senator Hutchison, that says, OK, let's make the small business administrator, local government administrator part of the team. Let's give them some incentives to work with the Environmental Protection Agency to recognize these problems and clean them up. They'll get cleaned up faster and better.

I think Senator Lautenberg made a good point there. If you can make that part of the employee record, then the employee becomes subject to discipline through the administration. If for some reason you can't make that, then it makes that much more difficult to dismiss that employee, perhaps at a later time, if he persists in that type of behavior.

Trish Bangert is going to testify before your committee here in the next panel. She works with the Attorney General's office from the State of Colorado. They are working on this issue, and she'll be able to go into more detail on some of these problems that we've had in the State of Colorado.

But basically, Senator Enzi, that's what you're trying to do, is just make the business man or perhaps the local government, I don't think we have enough EPA employees to be involved in each local government to monitor them, as a matter of fact. You're trying to make them a part of the team in cleaning up the environment, isn't that basically what you're trying to do?

Senator ENZI. Yes, I'm trying to increase the amount of people that are interested in getting something done. I know we can't afford to hire 50 times as many EPA auditors.

Senator ALLARD. Well, you know, I happen to agree with that. I can point, you know, the Federal Government is one of the largest polluters in the country. In the State of Colorado, they treat themselves differently than they do everybody else. I have a real problem with this adversarial relationship that the Environmental Protection Agency is trying to set up with the local governments or the local communities when they have a problem in their own back yard.

It seems to me if we can pull things together and make everybody, if we really want to clean up the environment, the success to that is having everybody work together. So Mr. Chairman, those are just some brief comments I wanted to make. I wanted to give Senator Enzi an opportunity to elaborate a little more.

I suspect that probably a lot of his Wyoming constituents have seen what's happened in Colorado and backed off on self-audits, because they saw what happened in our State and other States.

Would you like to respond to that, Senator Enzi?

Senator ENZI. Yes. I can respond more than just for Wyoming, in fact, on it. That's that in most of the States where it passed, there's been a sudden decrease in the number of people that are out there looking for their environmental problems, because there is that uncertainty. They're not sure what the EPA and the Federal Government are going to do.

So it's stopping a process that was solving a lot of problems. As I mentioned, it was solving problems even in instances where the EPA came in and did the inspections, when they did their own thorough inspection, they found problems that the EPA had missed on as many as three or four previous inspections.

So it can solve problems, it is a solution, it's a way to encourage people. Of course, the value of it is in the way that you draw the parameters. That's the opportunity that you have. You have a chance to get people involved in environmental cleanup and still protect against some of the things that have been brought up here today. I think the legislation that I've drafted takes care of most of the concerns you have.

Senator CHAFEE. I'm not sure I understood this latest exchange. What your point is that, and what Senator——I'm not sure what Senator Allard meant when he said people in Wyoming saw what happened in Colorado.

Senator ENZI. Yes.

Senator CHAFEE. Is the point you're making here that under the State laws you passed, there's an encouragement to come forward and reveal, to conduct an audit to start with and then try to do something about it. But the point you're making is that the Federal Government then comes in, the EPA does, and over-files, as it

were, and comes down on you like a ton of bricks? If you'd remained quiet, you wouldn't have gotten into all that trouble? Is that the point?

Senator ENZI. That's the point.

Senator CHAFEE. So that's the need for the Federal legislation.

Senator ENZI. Yes.

Senator CHAFEE. That's why you're here.

Senator ALLARD. Mr. Chairman, the State of Colorado, this incident that happened in the State was reviewed by the Colorado Department of Health. There are no shrinking violets in that department when it comes to environmental concerns. They worked it out.

The problem that I think probably Trish Bangert will talk to you about was handled in a very responsible manner, and then quickly remediated. Then the EPA ignores all that, they say, well, there's that initial violation, so you're subject to a $10,000 fine.

The fact is, if that self-audit wasn't there, that employee, that local unit of government would not have reported it, and nobody would even have known that there was that violation.

Senator CHAFEE. That's the need for the Federal law.

Senator ALLARD. That's the need, and that's the way I see it, that's the need for the Federal legislation.

Senator CHAFEE. All right, fine. Thank you very much, Senator. Senator Enzi, if you'd like to come up and join us here on the rostrum, you can do so. I know you're very interested in this subject. I have several statements by Senators who cannot be here today, but wish to have their statements placed in the record.

[The prepared statements of Senators Smith, Thomas, and Hutchinson follow:]

PREPARED STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

I am pleased to attend this hearing regarding the legal privilege issues associated with environmental audits. This issue provides a useful opportunity to see whether common sense can be part of our environmental laws. I look forward to hearing what the witnesses will have to say on this matter.

I believe the Senate should seriously consider environmental audit legislation for a variety of reasons. In general, I believe it has the potential to encourage companies to act proactively to do the right thing with regard to the environment. Environmental audits will encourage companies to search out and correct problems and not be afraid of doing so. Many States have come to the conclusion that industry needs to be provided with more incentives to encourage environmental innovation, not merely more penalties for noncompliance. Increasingly, I think some in Congress are coming to the same conclusion.

My home State of New Hampshire has an audit law that was strongly supported in the State legislature. In just the last few years, 24 States have enacted environmental audit laws, and recent experience with these statutes has demonstrated that positive results are already being accomplished in meeting our common goal of protecting human health and the environment.

I believe that the congressionally-enacted protection of State environmental laws may be necessary to stop the chilling effect caused by needless and destructive meddling from inside-the-beltway bureaucrats. Unfortunately, some people still think they know more just because they work in Washington. Hopefully, today's hearing will shed some light on this important matter. Thank you.

PREPARED OF STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman, thank you for holding this hearing today. I welcome my colleague from Wyoming, Senator Enzi, and look forward to his testimony. It is important that we examine the concept of environmental self-audits. Well over half of the States have some kind of audit law or policy. The question is then, are we going to allow States to pursue this innovative concept to protect the environment, or is the Environmental Protection Agency (EPA) going to insist on its traditional command and control, outdated way of doing business?

In 1995, the Wyoming Legislature, under the leadership of now U.S. Senator Enzi, passed an environmental self-audit law. It was good legislation that would create incentives for businesses to identify and correct their pollution problems. It is important to emphasize that point; the intent of the Wyoming law and all audit laws is to protect the environment. They don't roll back other environmental standards. They take a different approach than the traditional environmental enforcement methods of the past, that is focusing on environmental protection and cleanup rather than penalties and sanctions. These laws will allow enforcement officials to focus their limited enforcement resources on "bad actors."

Unfortunately, earlier this year, EPA delayed the transfer of final authority over several pollution programs, including the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act, to the Wyoming Department of Environmental Quality (DEQ) because of concerns over the State's environmental self-audit law. EPA also threatened to remove State primacy for other environmental laws. Aside from the very serious issue of trampling on the State of Wyoming's 10th Amendment rights, EPA's adversarial approach won't help us get any closer to achieving our mutual goal of protecting the environment. It is my understanding that EPA has backed off a bit and is now negotiating in good faith with the State of Wyoming. I strongly encourage EPA to continue that dialog and reach a constructive agreement.

I am sure that we will hear today from EPA that Federal legislation is not necessary because they have an administrative policy to encourage self-disclosure. Indeed, it is a good, first step forward. However, the EPA policy doesn't provide enough incentives to businesses for it to be an effective environmental protection tool. In a nutshell, the EPA's policy is that it will not prosecute businesses as aggressively as it could otherwise if a company comes forward and discloses a violation. The business is not protected from lawsuits or penalties. In fact, EPA strongly opposes providing privilege or immunity for these businesses, alleging that it will "let polluters off the hook" Nothing could be further from the truth. Under these laws, there is no protection for: Willful and intentional violations; companies that do not promptly cure violations; companies asserting the law fraudulently. Further, companies can't hide information through audits that they would ordinarily have to disclose under other laws and regulations.

Our environment is cleaner than it was 25 years ago. In order to protect our natural resources for the next century, we need to follow the States' lead and utilize innovative concepts like self-audit laws. I commend Senators Enzi and Hutchison for coming forward with this legislation and look forward to working with them on this important issue in the future.

PREPARED STATEMENT OF HON. TIM HUTCHINSON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Thank you, Mr. Chairman. Mr. Chairman, I am pleased that you have seen fit to call this hearing today on environmental self-audits. In my opinion, this is one of the more important environmental issues that this committee will consider this Congress.

Environmental self-audits can be a first step toward creating a system whereby industry becomes an actor in improving our environment, instead of being labeled as a participant in destroying it. Instead of constantly fighting against the Environmental Protection Agency, industry can become a partner by working out environmental problems before they become too severe.

There certainly is precedent in passing this type of legislation, in that it has been approved in 24 States, with several others considering similar legislation. These States have recognized the necessity of protecting those industries who are attempting to be responsible environmental stewards.

Self-audits, however will not be a legitimate reality unless Federal legislation like we are considering today is passed. This legislation will encourage industry to actively

pursue an aggressive strategy of self-audits, without the fear of reciprocation from the EPA, the Department of Justice or other law enforcement agencies.

Environmental self-audits are the epitome of environmental responsibility on the part of industry. In this day when environmental rules and regulations have become so complex that it takes hundreds of experts to determine whether a company is in compliance with environmental laws, it only makes sense that a company have a system whereby they test their compliance. This type of testing will not only allow a company to avoid unnecessary red tape and potential fines, but it could dramatically increase environmental protection, and in the long term, eliminate costly cleanup.

These responsible companies must have the protection from potential litigation that may result from their internal audits. If the results of their audits are used against them in litigation, not only is there no incentive to perform internal audits, there is significant incentive to avoid them.

While there is criticism that companies would take advantage of this law to get around environmental protection, I believe there are significant safeguards that will prevent this from happening. Among other willful violations, companies who intentionally violate the law, don't promptly mend violations, or have patterns of violations are exempted from any kind of protection.

I strongly support this legislation and look forward to working with Senators Hutchison and Enzi toward passing a bill that is both environmentally responsible and fair to those companies who perform the audits.

Senator CHAFEE. Now let's have the next panel please come forward. If Senator Hutchison comes in, we'll insert her in and let her proceed.

But we now have the Honorable Steven Herman, assistant administrator for the Office of Enforcement and Compliance; Mr. Barry McBee, chairman, Texas Natural Resource Conservation Commission; Ms. Patricia Bangert, director, Legal Policy, Colorado Office of the Attorney General; Mr. Paul Wallach, on behalf of the National Association of Manufacturers and the Corporate Environmental Enforcement Council; and Mr. Mark Woodall, from the Sierra Club.

So we'll go in that order. We'll start with Mr. Herman. We welcome you here, Mr. Herman. Go to it.

STATEMENT OF STEVEN H. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY

Mr. HERMAN. Thank you very much, Mr. Chairman. It's a pleasure to be here before you today.

One of the first actions——

Senator CHAFEE. I would say, I failed to mention, if you can have your statements roughly in the area of five minutes, and you can see the clocks here. We'll give you a little latitude, but don't press me too hard.

Mr. HERMAN. I'm going to try and come in within that limit, Mr. Chairman.

One of the first actions we took when Administrator Browner reorganized the enforcement program at EPA was to develop a policy to encourage the performance of voluntary self-audits by the regulated community. We believe that self-policing incentives, along with a strong environmental enforcement program, are essential to protecting the environment through achieving better environmental compliance with our environmental laws.

The EPA environmental self-auditing policy was issued two years ago. Under that policy, companies that voluntarily discover, promptly disclose and correct violations, prevent their recurrence

and remedy any environmental damage, do not face gravity-based penalties. In addition, our policy does not recommend, and I think this goes to what Senator Sessions was talking about a little before, our policy does not recommend corporate criminal prosecution for companies that meet the terms of the policy.

To protect public health and safety, the policy does not apply to disclosures involving individual criminal conduct, repeat violations, and violations involving serious harm to the environment or people, or imminent and substantial endangerment. Our policy has won praise from some in industry, environmental groups and from local, State and Federal law enforcement officials. Even more important, the policy has been a success.

Just this month, EPA and the GTE corporation used the policy to resolve more than 600 violations at 314 facilities in 21 States. Under the agreement, GTE pays a $52,000 penalty. That's what its economic benefit was. EPA waived $2.38 million in penalties. GTE corrected the violations and has taken steps to prevent future ones.

Overall, and I want to emphasize, overall, 225 companies have disclosed and corrected violations under the policy at more than 700 facilities around the country. These include Fortune 500 companies and small businesses. EPA has made the use of the audit policy a priority for next year, and during the next 18 months we will also be evaluating the results of our self-policing policy.

Many States have adopted auditing incentives, some administratively, and others by legislation. A number of State approaches are consistent with EPA's. Other State approaches we feel are less protective, because they impose secrecy and they provide for arbitrary immunities.

Where there should be openness, State audit privilege laws strip the State of statutory authority to obtain information.

EPA has both legal and policy concerns where States create such audit privileges and immunities. As a legal matter, for example, Federal environmental laws mandate that EPA ensure that delegated States maintain minimum enforcement authority, including the authority to get injunctive relief and penalties, and also have minimum authorities to secure information necessary to monitor and ensure compliance.

Our goal is to ensure that States have the minimum authorities required to run delegated State programs. We are dependent on these programs to achieve a high level of compliance and protection.

In light of these requirements, we have worked with States to modify their audit laws so that they will meet minimum Federal-State standards. We are not against experimentation. We are not against different approaches. What we are saying is that the experiments have to be done within the bounds of existing Federal law.

Our discussions with Utah and Texas have resulted in changes to their laws that meet the needs of both the State and the Federal Government. We have continued to have discussions with other States, and many of them have gone favorably.

As a policy matter, which is different than the constraints imposed by the law, but as a policy matter, as I have stated in this committee and on numerous other occasions, EPA opposes privilege

and immunity legislation, including what we have been able to see of S. 866. We have not studied Senator Enzi's bill to date.

Audit privilege laws promote secrecy. That is their purpose. They are anti-law enforcement. They impede the public's right to know. Some even penalize employees who report illegal activity to law enforcement authorities.

These statutes interfere with the Government's ability to obtain the information it needs to protect the public health and safety. They may also shield environmental criminals from prosecution. In short, why should we make it easier for violators and harder for our State and local law enforcement officials?

While we support penalty mitigation as an incentive to self-policing, we believe that to immunize serious violations, including those where there may be criminal conduct, imminent and substantial endangerment and actual harm, is wrong. Such immunity laws discourage needed investments in pollution control, lower the standard of care, and undermine the rule of law.

It is unfortunate, Mr. Chairman, that representatives from numerous States that support a balanced approach to environmental auditing are not able to appear here today. In Exhibit 3 to my written statement, I have included opinions from some of the many local, State, and Federal law enforcement and environmental officials and citizens who support environmental auditing, but who oppose privileges and immunities.

In conclusion, I would like to quote from an October 24, 1997 letter sent to you, Mr. Chairman, by William Murphy, the president of the National District Attorneys Association. The NDAA emphasizes its opposition to environmental self-audit privilege as contained in legislation before the States. "We continue to believe that this is an extreme measure far beyond any remedy necessary, and that if you enact self-audit privilege you will be doing a vast disservice to law enforcement efforts, not only in the realm of environmental law, but across the spectrum of white collar crime."

Finally, and I will be glad to go into more detail——

Senator CHAFEE. That letter was addressed to me, apparently?

Mr. HERMAN. That's correct.

Senator CHAFEE. I'll make sure that the other members get a copy of that.

Mr. HERMAN. Thank you, Mr. Chairman.

One last thing that both Senator Enzi and Senator Allard mentioned, the importance of bringing in small business. I would mention that our small business policy was referenced in the Small Business Regulatory Enforcement Fairness Act (SBREFA) legislation passed last session, and was referenced as a positive approach to working with small business in terms of mitigating penalties.

Thank you again very much for the opportunity to testify before your committee. I agree, this is a very important issue, and I look forward to answering any questions you may have.

Senator CHAFEE. Thank you, Mr. Herman.

This is what we're going to do. We'd like the panel to stay here, and we'll ask that you wait until everybody testifies, then we'll have questions for the panel.

Now we're going to have a slight change. Mr. Herman, if you could just step back into a chair back there.

Senator Hutchison is here and we want to give her an opportunity. We welcome you, Senator, and you forward.

STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman.

I do not want to disrupt the panel, and I apologize for being late. I'm chairman of the Surface Transportation Subcommittee, and a member of the Surface Transportation Board was before our committee. That's why I was late.

Senator CHAFEE. Well, that's very important in our lives. We give you wide privileges.

Senator HUTCHISON. I don't want to hold up this panel. But I would like to just have a statement submitted for the record regarding my bill, which is similar in some ways to Senator Enzi's bill. I do support Senator Enzi's bill. I think his bill is very important, because the States that have taken this approach are showing that it does increase environmental quality. What his bill does on the State level my bill does on the Federal level. Texas is one of those States being challenged by EPA. I'm pleased that Barry McBee, the chairman of our Natural Resources Conservation Commission in Texas, is here. He will talk about the difficult situation in Texas.

My bill, the Environmental Protection Partnership Act, speaks also to the Federal level. It allows many of the same activities to go forward by encouraging the companies to voluntarily do audits and take corrective action and report the violations without being penalized unfairly by the EPA. It does it at the Federal level, what I think Senator Enzi's bill allows States to do under their own laws that have the same type of protection.

Basically, I think audit regulation is so important because if we can encourage companies to voluntarily audit themselves so that they can root out any environmental problems they have, I think we will be able to go beyond just what the EPA and regulators are able to do under the present structure. Although the EPA has a policy on this, I think it's important that there be a law because the policy can be changed without any notice to parties. This discourages companies from relying on the policy.

So my goal is to put into law a policy that will encourage companies to do self-audits and take corrective action and be able to report that they have done so. My bill would allow companies to do this without penalty if they take corrective action. However, if their audit is done and they do not take corrective action, or they refuse to take corrective action, then they could still be penalized.

I think this is a good approach. I would like to work with the committee to try to form a policy that is positive.

I know that you have many other witnesses. But I would like for you to look at both my bill and Senator Enzi's bill and perhaps even work on both of them at the same time.

[The prepared statements of Senators Hutchison and Lott follow:]

PREPARED STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Thank you, Mr. Chairman for the opportunity to present testimony on the important issue of voluntary environmental audit.

Environmental protection as we have known it in this country for the last quarter century is based on the command-and-control model and we have greatly improved our environment as a result. Our rivers are cleaner, we breathe cleaner air.

But it is precisely this progress that makes it necessary for us to reconsider our present regime. Experience shows that we can increase environmental protections even more if, in addition to existing enforcement tools, we partner with businesses by encouraging them to voluntarily assist oar State and Federal agencies in protecting the environment. We must institute policies that accommodate this broader effort so we can target enforcement resources where they will be most effective.

Many companies have developed sophisticated environmental compliance systems to determine not only whether their operations are complying with existing standards, but how they can avoid future problems. These companies have invested in cutting-edge technology and expert personnel to search for ways to improve their environmental performance. They are way ahead of the regulators in finding potential problems and avoiding environmental harm. Clearly, it is to everyone's advantage to encourage these efforts.

Nevertheless, under present Federal law, we almost always treat companies that voluntarily audit their compliance worse than companies that violate the law and hide the violations. The law punishes a company that "comes clean" and reports violations that it finds and fixes. Meanwhile, a company that fails to investigate or otherwise hides violations could likely go scot free. In addition, the law discourages companies from producing detailed reports beyond those required by law, since they thereby increase their potential liability to third parties in an era of billion-dollar lawsuit awards.

This situation is worse in States with audit protection laws. Right now in Texas, if a company in good faith finds, fixes and reports a violation to the State, it is not punished by the State. Unfortunately, the Federal Government has the authority to use this same information the company willingly turned over to the State to fine the company for Federal violations of the very same law. This hardly creates an atmosphere of cooperation.

The notion that voluntary audits should be encouraged is not ground breaking. Even back in 1990, Congress strongly encouraged voluntary audits in the conference report on the Clean Air Act amendments, noting that substantial benefits could be achieved.

Yet here we are at the close of 1997, and Congress still has not acted to give companies the go-ahead to conduct voluntary environmental audits.

States have, however. States have boldly—and bipartisanly—adopted laws that ensure companies that they will not be punished for cultivating thoroughness and vigilance in environmental compliance. 23 States have these laws so far.

What I propose is that Congress take its cue from the States and adjust Federal law to encourage companies to search for possible violations of environmental regulations. Together with Majority Leader Trent Lott, I introduced the "Environmental Protections Partnership Act of 1997", S. 866.

Under this bill, if a regulated entity voluntarily audits its compliance with environmental laws, the government may not turn around and use the audit report against the company in an enforcement action.

In addition, if a company does an audit, promptly corrects any violations, and reports the violations to EPA, no punitive action will be taken against the company for the violations. By ensuring companies that they will not be dragged into court for being honest, the bill encourages companies to find and fix violations and report them to EPA.

In order to ensure that these laws do not protect bad actors, I have included several protections: (1) No one gets the benefits of this bill who does not promptly correct and disclose violations uncovered in an audit. (2) Repeat violators do not get any benefits of the bill. (3) Willful and intentional violators are in no way protected by the bill. (4) The Federal Government is not prohibited from getting an injunction against a violator if it is necessary to protect public health or the environment, nor is the government prohibited from inspecting or monitoring compliance with existing law.

Our old-world model of environmental protection will not serve us in the next century. An the new model—a public/private joint venture to find and fix violations—is already in place in 23 States. Congress should resign its role as the ball and chain of environmental enforcement and start looking for ways to encourage positive action and compliance beyond the scope of present capability.

PREPARED STATEMENT OF HON. TRENT LOTT, U.S. SENATOR FROM THE STATE OF MISSISSIPPI

I would like to thank Chairman Chafee and the Committee for this opportunity to comment on S. 866, Senator Kay Bailey Hutchison's environmental voluntary self-audit legislation. I commend the committee for addressing this very important issue, and hope that my testimony is helpful in highlighting the need for a Federal initiative in this area.

S. 866 provides a necessary Federal standard regarding voluntary environmental self-auditing for States. There are nearly two dozen States that have passed or are experimenting with laws to encourage self-audits. These laws are aimed at increasing environmental protection and directing scarce enforcement resources toward the real bad actors. We need Federal legislation to make these State laws work as they were intended. I believe that Senator Hutchison has found a balanced and fair approach.

As the number and scope of Federal regulations increase, there is an even greater need for self-audit programs. Generally, an environmental audit is a means of reviewing a business' activities in order to get a "snapshot" of its overall compliance with the law and to avoid potential future problems. Although no State or Federal law requires companies to undertake comprehensive self-audits, it is a good business practice initiated by those taking extra steps to stay in full compliance.

Self-audits are more extensive than an inspection by a State or Federal regulator because they are done more often and because companies simply know much more about their operations and permit obligations than regulators do. A company conducting its own audit can identify and correct a much wider range of potential environmental violations.

Unfortunately, many companies do not perform self-audits because the information contained in the audit documents can be obtained by government regulators, prosecutors, citizens' groups and private citizens and used to sue the company. These documents, if made public, are a roadmap for third parties to sue even if the problem has been corrected and no environmental harm has occurred. Due to the complexity of environmental law, it is possible and logical that companies which take on the task of self-evaluation will find problems—and that is what we want them to do. The threat of a lawsuit is a tremendous disadvantage to self-auditing.

Almost half of the nation's States, including Mississippi, have recognized this disincentive and have acted to correct this problem. These State laws typically do three things: (1) provide qualified evidentiary protection for internal audit documents, (2) grant penalty immunity to companies that conduct audits and voluntarily disclose all violations they discover in their audit, and (3) require prompt cleanup of the violation.

Under these State laws, the incentive to self-audit is reinstated. Responsible companies that find, report and fix problems are rewarded. These companies do not have to pay fines and are protected from any court action on an internal audit. But these companies must correct the deficiencies. This is key because without the audit, this particular deficiency would not have been corrected.

Americans get more environmental protection by allowing honest companies freedom from sanctions and penalties. Taxpayers get a better return on their tax dollars because enforcement resources can be directed toward those not complying with the law.

Critics of self-audit legislation claim that these State laws are about secrecy and letting polluters off the hook. This is just not true. These laws do not protect any information required by law to be collected, developed, maintained, reported or otherwise made available to a government agency. Any action that causes an imminent threat is not protected and must be immediately reported to authorities. Companies gain nothing from these laws if they are using an audit for a fraudulent purpose or if they find a violation and don't fix it.

These laws present a new way of doing business. Twenty-three States think this is a better way to get things done. Twenty-five others are considering voluntary self-audit legislation. Legislation on the Federal level will assist these States with a full and effective implementation of this concept if they desire to enact it.

Mr. Chairman, 95 million Americans live in States which have learned that self-audit legislation is a successful way to get there. I thank you for the opportunity to address the Committee and hope that this hearing will convince you of the need for Federal legislation.

Senator CHAFEE. Well, thank you, Senator. We'll certainly carefully examine your bill.

I think the point you make, and I'm going to obviously ask Mr. Herman about this when we get to the questions. There's a difference between a policy and a statute. As you point out, EPA has a policy but that can be changed. What worries me a little bit is the indefiniteness of it. It's not clear and certainly not written down what the law is in this subject as far as EPA dealing with these situations, where disclosure is made.

I'll ask Mr. Herman about that when the questioning period comes.

Now, we want to give the Senators a chance to ask you any questions.

Senator Baucus.

Senator BAUCUS. Thanks, Mr. Chairman. I have no questions, just want to thank Senator Hutchison.

This is not an easy area. It's not an easy subject. On the one hand, we want to encourage States to be flexible in their law enforcement approaches. On the other hand, we want our environmental statutes enforced. Therein lies the rub.

Your bill is certainly a contribution to the subject, and we appreciate your introducing it.

Senator HUTCHISON. Thank you, Senator Baucus.

Senator CHAFEE. Senator Sessions, do you have any questions of Senator Hutchison?

Senator SESSIONS. No, I just thank you very much for your work in raising this important issue. I do think we need to encourage our reporting and self-evaluation, and thank you for raising it.

Senator CHAFEE. Senator Lautenberg.

Senator LAUTENBERG. Thanks to Senator Hutchison.

But I also, Mr. Chairman, will forgo any questioning at this point.

Senator CHAFEE. All right. Again, thank you very much, Senator.

Senator HUTCHISON. Thanks for your forbearance.

Senator CHAFEE. You've made a fine contribution here, and we appreciate it.

Senator HUTCHISON. Thank you very much.

Senator CHAFEE. Now, Mr. McBee, Chairman, Texas Natural Resource Conservation Commission. Mr. McBee, why don't you proceed.

STATEMENT OF BARRY R. MCBEE, CHAIRMAN, TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Mr. MCBEE. Thank you, Mr. Chairman, and members. I am the chairman of Texas——

Senator CHAFEE. Senator, if you wish to sit up here, you may do so. I know you have a heavy schedule, so you do as you wish.

Senator HUTCHISON. I thank you very much. I do want to welcome my colleague here, and he is very, very knowledgeable. So I hope he can explain our Texas law. But I will not be able to stay. Thank you very much.

Senator CHAFEE. A George Bush appointee?

Senator HUTCHISON. Yes, he is.

Mr. MCBEE. Yes, Senator.

Senator CHAFEE. OK, thank you.

Go to it, Mr. McBee.

Mr. MCBEE. Thank you again, Mr. Chairman and members of the committee.

As noted, I am Barry McBee. I am chairman of the Texas Natural Resource Conservation Commission, Texas' multimedia, comprehensive environmental agency. One of our guiding principles is to promote and foster voluntary compliance with environmental laws. To further this goal, we pursue an effective and efficient compliance and enforcement program that maximizes voluntary compliance, ensures that potential polluters are informed of their environmental responsibilities, and compels compliance through legal action when necessary to protect public health and the environment.

This opportunity to provide testimony regarding privilege and immunity provisions of environmental self-audit laws comes at a critical time for the future course of the State-Federal relationship. EPA Administrator Carol Browner has said that she views the relationship between the Federal and State environmental agencies much like a marriage.

Based on my experience, EPA often sees States as children and itself as the parent in a paternalistic relationship that is not appropriate, given the capabilities of State environmental agencies today. It is not healthy. It is one that we must both work to change.

In May 1995, Texas enacted an environmental audit privilege act, an initiative that our legislature thought was sound and beneficial public policy, for many of the reasons already articulated this morning. As we have heard, 24 State legislatures today have agreed and have adopted laws encouraging this type of partnership between we, the regulator, and those we regulate.

Rather than embracing these innovative State approaches and providing Federal support, however, EPA has been a persistent antagonist. Delegation to Texas of Federal environmental programs has been threatened, and ultimately, Texas was forced to compromise by amending its audit law to address some of EPA's concerns in order to get delegation back on track.

In passing the Texas audit act, the legislature believed that it was enacting a creative solution to achieving and monitoring compliance in a collaborative system, just the kind of approach espoused by President Clinton and by this Administration. EPA has not sought, in our view, to foster, but to stifle that sort of creativity.

In March of this year, a coalition of States, including Texas, met with EPA Administrator Browner and presented what was thought to be a reasonable compromise: A 2-year evaluation period of State environmental self-audit laws in States whose attorney general had certified that the State had the necessary regulatory authority to carry out any new or existing program. Administrator Browner rejected that proposal outright, telling States that there would be no moratorium, and that each State must negotiate with EPA officials to resolve their differences.

Texas came to the table with proposed revisions addressing the specific concerns EPA had raised, including changes to our statute to remove immunity and privilege with respect to criminal violations. In March 1997, high level negotiations between EPA and Texas resulted in a compromise being reached and specific legislative

changes were adopted by our legislature this year, and became effective on September 1, 1997.

However, I would take an opportunity to point out that in those negotiations, in our view, EPA stretched the common and clear meaning of the words of its regulations to incorporate instead its philosophies and policies. For example, out of the words appropriate penalty EPA concluded, contrary to our reading of regulatory and judicial precedent that Texas must recoup the economic benefit of non-compliance.

This language is not taken from any law passed by Congress that we can find, but only from EPA policy. We believe statutes should be strictly adhered to, and that EPA's arbitrarily selecting language that must be included in State laws from among its policies is inappropriate.

It should also be noted that EPA has actively pursued its opposition to the audit act in Texas outside the delegation context. In December 1996 and January 1997, five Texas companies that had taken advantage of the audit act and voluntarily disclosed violations were confronted with threatening EPA letters of inquiry regarding those same violations. These companies today remain under EPA investigation.

Texas now has almost 2½ years of very positive experience implementing our audit act. The audit privilege has shifted part of the burden to the regulated community to fund their own compliance, rather than keeping it on the State to fund more inspections. As noted in my written testimony provided to the committee, the audit act has provided very significant benefits to Texas and to our State's environment. At the same time, we have maintained a strong inspection and enforcement presence to provide a disincentive to fraudulent misuse of the audit legislation.

The lack of Federal cooperation in the implementation of State self-audit laws has created needless tension and uncertainty that hampers State efforts to experiment with innovative enforcement tools, and deters regulated entities from utilizing them. Federal legislation expressly allowing States authority to pursue such innovations would be a welcome development, to restore the States' ability to pursue approaches that differ from EPA's preferred policies. That is, I think, the gist of Senator Enzi's and Senator Hutchison's bills.

I hope, in closing, that my statement has provided you with some opportunity to understand the benefits Texas has derived from its use of self-audits as a compliance tool. We hope that next week, when EPA's inspector general visits the TNRCC to begin an investigation of the implementation of the Texas audit act that they will also recognize the merits of the Texas law, and that EPA will prepare for its implementation of the Federal environmental audit privilege and immunity legislation that we hope will be enacted by this session of the Congress.

Thank you all very much.

Senator CHAFEE. Thank you very much, Mr. McBee.

Now, Ms. Bangert, we welcome you, Director of Legal Policy, Colorado Office of the Attorney General.

STATEMENT OF PATRICIA S. BANGERT, DIRECTOR, LEGAL POLICY, ATTORNEY GENERAL'S OFFICE, STATE OF COLORADO

Ms. BANGERT. Thank you, Mr. Chairman, members of the committee.

I'm here today to testify on behalf of Gale Norton, the attorney general of Colorado. We appreciate this opportunity to address the important subject of State voluntary audit laws. I'm going to concur in Mr. McBee's remarks and add some insight, hopefully, from the Colorado experience.

Specifically, I want to make two points. Audit laws are good for the environment. The audit experiment may well fail. Sounds contradictory? Let me try to explain.

State audit programs may well fail, not because they're bad ideas, but because a Federal agency wants them to fail, and is working very hard to make them fail. Before I get to EPA, let me explain why I think the audit laws are good for the environment.

The Colorado audit law is not intended to allow anyone to hid information. Its purpose is to encourage companies and other regulated entities to create new information, specifically to encourage them to look voluntary at their environmental compliance, and to correct any deficiencies found there. All of this without Government participation or expense.

Twenty-five entities in Colorado have disclosed violations found in voluntary self-evaluations. Most of the disclosures solved problems that never would have been found absent the audit. Some resulted in long term benefits for the environment.

An example of this is the Denver Water Board, a situation mentioned by Senator Allard. The Denver Water Board is a municipal entity responsible for supplying water to Denver residents. In 1995, the board hired CH2MHill to perform an audit of its environmental compliance. The audit found discharges into old storm sewers and minor violations of the hazardous waste laws.

Upon finding the violations, the Water Board immediately notified the Department of Health and set about correcting the problems. What I'd like you to do is notice several things about the situation. First, the violations would never have been found absent the audit. The discharges into the old storm sewers had been occurring since before the Clean Water Act was passed in 1972, and had never been discovered. Second, the hazardous waste violations were so minor that a routine inspection would never have found them.

Also note that most of the violations were corrected immediately, within the same week that the discoveries were made, much, much sooner than a normal enforcement action would have required. Most important, notice that CH2MHill recommended changes going way beyond anything the regulators could have ordered. Changes the Denver Water Board, most of the changes, the Denver Water Board accepted and put into effect.

The Denver Water Board is a success story for self-audit laws. We could have more of these if it were not for EPA interference. In short, EPA has launched a campaign to ensure the failure of the audit experiment. In this campaign, the agency has used two tactics. I'll call them the delegation ploy and the over-file ploy.

The delegation ploy works as follows. EPA sets out a minimum for State delegated program that's a combination of law and EPA

policy. EPA then negotiates separately with each State. EPA rejected Ecosys' suggestion for a 2-year moratorium while the States experimented with audit laws and worked with EPA as a block.

In the individual negotiations, EPA pressures the States to eliminate or change their audit laws. Not surprisingly, the results of the negotiations are either no audit laws or an audit law that looks an awful lot like EPA's audit policy. As you know, Idaho sunsetted its law, Texas changed its law, Utah changed its law, Michigan has agreed to change its law.

At the same time that the EPA is intimidating States into changing their laws, the agency is discouraging companies from utilizing the audit laws. I call this the over-file ploy. Let's take Colorado. We've seen a dramatic increase in over-filings in Colorado in the past year.

Mr. Herman stated in earlier testimony to this committee that EPA over-filed in only four cases nationwide from October 1995 through October 1996. In the first several months of 1997, EPA over-filed in 3 cases in Colorado alone, and has threatened to over-file in 10 more. In addition, EPA has threatened to over-file against three entities that used the disclosure immunity provisions of the audit law in Colorado.

Remember the Denver Water Board? When the board disclosed violations to our Department of Health, it asked for immunity from fines under the audit law. The disclosures made the violations public. Upon learning of the disclosures, EPA rewarded the Water Board for its sensitivity to environmental compliance by requesting hundreds of pages of documents concerning the disclosed violations. Further, the agency has made no secret of the fact that it's considering over-filing against the board.

In conclusion, State representatives have tried to meet with EPA and come to some compromise regarding audit programs. The results have been disappointing. Unfortunately, EPA continues to wage its aggressive war against self-audits. We have no recourse then but to ask for legislative assistance.

Thank you, and again, we appreciate being here. We'd be happy to answer any questions that you might have when the time comes.

Senator CHAFEE. Thank you very much, Ms. Bangert.

Now Mr. Paul Wallach on behalf of the National Association of Manufacturers and the Corporate and Environmental Enforcement Council. Mr. Wallach.

STATEMENT OF PAUL WALLACH, SENIOR PARTNER, HALE AND DORR, LLP

Mr. WALLACH. Thank you, Mr. Chairman and members of the committee.

In addition to being a part-time car pool driver, as Senator Bond mentioned, and by the way, that was a bipartisan car pool, I have practiced environmental law with the law firm of Hale and Dorr for many more years than I want to remember.

I prepared, Mr. Chairman, a written statement that I ask be submitted into the record. The staff has copies.

Senator CHAFEE. That's fine.

Mr. WALLACH. As you mentioned, I am here today on behalf of the National Association of Manufacturers and the Corporate Environmental

Enforcement Council. As I believe you know, NAM is one of the oldest and largest broad-based industrial trade associations. It is the oldest and largest in the country. It has more than 14,000 members. It includes approximately 10,000 small manufacturers in every State.

CEEC is an organization of 22 major companies that are all regarded as having very progressive and strong commitments to the environment and environmental programs. It was formed several years ago to look at environmental enforcement policy issues exclusively, and the question of whether environmental enforcement is always furthering the goal of environmental protection, and where it is not, to address those issues.

I brought with me a copy of CEEC's Platform, which is also attached to my statement, and would ask that it also be introduced into the record.

I should add, Mr. Chairman, as you know, I chair the New England Council's Environment Committee, although I am not here in that capacity. I do want to say that we have had extensive meetings at the New England Council and have spoken with the New England congressional delegation. As New Englanders who are very concerned about the environment, the council has adopted a very strong resolution in support of Federal audit legislation.

Both NAM and CEEC have carefully considered, and their members have carefully considered, the issues relating to voluntary auditing and voluntary disclosure. Without question, the failure to have in place adequate and certain protection for voluntary audits has created strong disincentives and obstacles to auditing. A lot of companies do audits, even in the face of these obstacles.

It is the right thing to do. But I can tell you that the lack of protection for these audits has a very real, chilling effect, which in practical terms limits their scope, their aggressiveness, and really, I think if you look at the people who have to provide the information to the auditors, quite frankly, their concerns limit the ability to get information during these audits, because of the chilling effects.

Let me pose another policy issue, or pose the issue in another way. A manufacturer, university, governmental entity, hospital, that aggressively audits, as well as their management and personnel, should not be placing themselves in the position of greater potential liability than a company or entity that does not audit. Yet this is exactly what is happening. Documents and information developed through voluntary self-evaluations can and are being used against regulated entities and individuals in a variety of contexts.

The concerns of individuals and of companies is really heightened by the massive potential civil penalties and very real possibility of criminal convictions under the environmental laws for inadvertent conduct. If time allows and the question is appropriate, I would like to address the issue later of why the environmental area is different, Senator Baucus, than other areas.

I should also mention that seven years ago, in a bipartisan fashion, in a statement of managers and the conference report for the Clean Air Act amendments of 1990, when both you and Senator Chafee, Senator Baucus, were very much involved, there was very strong support given for environmental auditing, and mention of

the fact that the hope would be that these criminal provisions would not interfere with that, and audits would not be misused.

Well, they have been. We support, NAM and CEEC support Federal legislation because we see a very important opportunity for the environment. We hope this opportunity is not lost in rhetoric and skepticism. We hope you will see through that.

The regulated community has no ulterior motive. It simply wants to feel comfortable and wants its people to feel comfortable—aggressively auditing facilities, correcting non-compliance, spotting problem areas and improving operations. It's not fair to expose those who do all that to enhanced potential liability.

I have to say that I am somewhat puzzled by EPA's position. The agency has repeatedly emphasized that it is not going to go after audit reports, it is not going to seek audit reports, and it has not done that in the past. If that's the case, I don't understand how it can impede its ability to enforce environmental laws not to get these audit reports. EPA cannot have it both ways.

I'd also like to say that the parade of horribles and the concerns that have been identified, when you really analyze them, which I think is important, we don't have specific examples from the opponents, and I'd like to hear specific examples, because in my 20 odd years of practice, I can't come up with them.

In fact, I think very clearly this is going to provide a greater right to know than we would have now, because of the disclosure requirements under the environmental laws. One of the attachments in my written statement contains a full page listing of all of the disclosure requirements where you are required to disclose when you find out, for example, that there's been a release of reportable quantity that you may not have known about before.

That will get that information out to the public, to the neighbors. It might not have been discovered before, inadvertently. There's not going to be blanket immunity, there's going to be no protections at all for intentional bad actors. I think, as I said, there's not going to be any secrecy.

I think it's important, and I can give specific examples during the questions as to how more additional information will get out. I think the States have recognized the benefits, you've heard the EPA's reaction. I'm especially troubled because I see from a very practical standpoint representing individual companies, and I see it from NAM members and CEEC members, the concern that this conduct is having on the regulated community. They're sort of a pawn in the battle, in some respects, between the States and EPA.

EPA is sending letters, demanding a huge amount of production of documents from those companies that do utilize the audit laws in the different States. That has a very, very real chilling effect.

I frankly don't understand EPA's position with respect to the State laws and I'd just like to mention one point. EPA says that they don't have access to audit reports, the State does not have an adequate enforcement structure or an adequate enforcement authority.

My question would be, what happens if no one in the State audited? Does that mean that the State doesn't have adequate enforcement authority? Or if the companies in a State assert the attorney-

client privilege for their audits, which a lot do. Does that mean the State doesn't have adequate enforcement authority?

The argument, upon analysis, really does not make sense.

Finally, with respect to the policy that EPA issued in December 1995, I do want to compliment the agency. Steve Herman in particular, I think he's worked very hard in terms of issuing that policy and implementing it. It is an important step forward. I think industry recognizes that.

We respectfully disagree on the significance, however. It does not eliminate the disincentives and obstacles to auditing and disclosure. It does not create the certainty that we need to have the people who provide the information. There are nine criteria in there that you have to satisfy to meet the policy, for the policy to apply, Senators. Those are very discretionary. You cannot be certain the policy is going to apply.

It does not apply to individuals. The policy offers no protection whatsoever to individuals. I could go through a number of other deficiencies in the policy. But even if the policy were a perfect policy, it would not supplant the need for Federal legislation. Because it cannot, the agency does not have the authority to remove the obstacles.

With that, I'd like to say that both NAM and CEEC look forward to working with the Congress in a bipartisan fashion to see if we can fully explain the values of audit legislation and have them recognized, and hopefully get a bill through that's good for the environment.

Thank you.

Senator CHAFEE. Thank you very much for that testimony, Mr. Wallach.

I would call Mr. Herman's attention to Mr. Wallach's testimony, on page 18.

Senator BAUCUS. We have another witness here.

Senator CHAFEE. Yes, I know. I'm going to get right to him.

Mr. Herman, if you would have your folks take a look at page 18 where Mr. Wallach lists elements of this legislation. He says they're neither novel nor without precedent, and lists some other outfits where these are taking place. I just thought I'd forewarn you that I will be asking you a question about that.

Now we have Mr. Mark Woodall from the Sierra Club. We look forward to your testimony, Mr. Woodall.

STATEMENT OF MARK WOODALL, CHAIR, LEGISLATIVE COMMITTEE, SIERRA CLUB, GEORGIA CHAPTER

Mr. WOODALL. Thank you, Mr. Chairman and members of the committee. I want to thank you for allowing me to make a statement on behalf of over 500,000 members of the Sierra Club.

I'm the chair of our legislative committee in the State of Georgia and also the volunteer chair of our National Audit Privilege Task Force. I'm a commercial tree farmer by occupation.

I'm co-submitting this testimony on behalf of U.S. Public Interest Research Group. The Sierra Club and U.S. PIRG are organizations that have brought numerous citizen enforcement actions under our national environmental laws, are committed to preserving the legal tools that ordinary citizens have fought for and need to protect

themselves from harmful pollution in their communities. This is one of the many reasons that Sierra Club and PIRG and over 100 other public interest groups, both national, local and State, are bitterly opposed to the creation of any secrecy privilege or broad immunity rights for institutes who undertake environmental self-audits at either the State or Federal level.

In particular, we strongly oppose S. 866, as well as any other bill that would restrict our Federal EPA from its ability to administer delegated programs in States with these audit privilege immunity laws. As you heard earlier, the District Attorneys Association has written to you and in the past that the adoption of such a privilege is an extreme measure, far beyond any remedy necessary. We would say it is a radical measure that would create a vast dumping ground for corporate dirty secrets.

I think we need to take a look, as we observe the 25th anniversary of the Clean Water Act, and think about why it is that we have made progress. What are the current incentives under our present legal system. We believe that the reason that people just don't dump it in the river, whether it's a Federal facility or corporation or whatever, is because they fear liability, they fear enforcement, both of Federal, citizen or State enforcement. Certainly, they're concerned about the public right to know, as Senator Lautenberg pointed out. We have the public right to know, which is often followed by the public pressure to clean up these neighborhoods.

Those are the current incentives that really drive what's going on in the United States. What we're talking about here is directly opposite, it's a direct attack on the incentives that we had in place. What we're talking about here is turning the right to know into the right to know nothing, or the right to keep dirty secrets. What we're talking about here is hurting real people. The experience we've had out there, we've already found, I think, the kind of mischief that's going to come up with these laws, which will be even worse with a Federal law.

I would call your attention to the testimony written by the folks in Cincinnati, Ms. Briscoe and Reverend Lundy in Cincinnati. They submitted this testimony so you could see the experience they've had with a giant corporation, and their use and abuse of audit privilege.

The lessons they want to share here were learned in attempting to find out about toxic landfill gas next to a waste management landfill in Cincinnati. They say they were forced to organize to protect themselves because time and again, local and State authorities did not protect them. They were willingly or carelessly misled by Waste Management, Inc.

Now, this landfill has operated since 1973 in the midst of a densely populated area of Cincinnati, thousands of people living within a short distance of the landfill. What they had is landfill gas migration. They say it's robbed those of us who live near the landfill of the use of our yards, the ability to have our windows open in summer, and has eroded their quality of life. They believe they had a right to know about this gas exposure years ago.

But if you follow what has gone on, first there was an administrative proceeding when Waste Management wanted to expand this

landfill. At that time, Waste Management said its internal audits were confidential and privileged and hid the information, therefore, from the community. After numerous motions to compel disclosure, some of this information came across. But then, Waste Management said they had a pending Ohio audit privilege bill and started holding documents back.

So the folks blocked the expansion in this administrative procedure. Then the Ohio legislature actually passed the audit privilege bill. Waste Management had the brass, I guess you would call it, to call up the EPA in Ohio, Ohio EPA, and say, give us our audits back, we passed a State law making that privileged.

Then the citizens went to Federal court, Federal citizens suit, to try and get them to do what they should have done, and they knew they should have done, to mitigate this landfill gas. Now, that's ongoing, and Waste Management has tried to block discovery, block the truth about this, from Federal court, based on the State's audit privilege law.

I would say to you that this is a fine example and I think there are more coming of the kind of mischief we're going to get into. They asked some questions here which I think are very relevant. If one of the national architects of this audit privilege movement around the States is capable of making this use of just a pending bill, since a company will apply pending legislation to audits prior to the passage of a bill, what basis is there to believe that other polluters will act any differently?

They also ask, how will anyone know if when a polluter has secretly slipped the truth about its pollution into a file which the polluter has labeled audit. I think that's one thing, as we study what's going on in State laws, I noticed in Colorado the headline was, polluters get off scott free, in the Denver paper.

The thing you need to understand is, these folks can set up a file cabinet and just start stuffing documents in there that they don't want to see the light of day. To make all this information privileged, secret from judges and juries, is just a terrible threat to the health and human environment here in the United States. We urge you to strongly oppose this reckless proposal.

Senator CHAFEE. All right, thank you, Mr. Woodall.

Now, Mr. Herman, you've heard the presentations here of the others. It seems to me it boils down to, I don't want to get back and forth on the privilege business, but it seems to me the problems that the others raise is the indefiniteness that comes up under EPA, that if a company goes ahead and has an audit, does the right thing, and reports it in advance, has the audit, discovers certain things, takes actions to correct those, everything that we'd want a company to do, they're not sure that EPA will not be able to come in with considerable force later on and slap them with a great big fine.

Now, I must say, Mr. McBee, I think it was he that said he wasn't, Texas didn't really want the fine to include monetary advantage that the company had achieved over its competitors as being part of the fine. I may be misquoting you there, but we can get to that in a minute.

But I must say, I think that any advantage that a company had gotten because it was a bad actor should be included in the damages

allowed. But what do you say? You say you've got a policy, but they, the opponents, Mr. Enzi, and so forth say, well, that isn't enough. You folks can change a policy. I think Ms. Bangert said that. Then leave the company that made all this effort high and dry.

What do you say to that?

Mr. HERMAN. Well, Senator, I think there's two parts. One is, I think certainty and consistency are both important and should be expected. I think what we have publicly stated, we're abiding by our policy. I set up a group, made up of regional and headquarters personnel, to review every single audit submission.

We have had, and I mention this again, over 600, or it's over 700, I think, facilities come in to us and we have processed these matters. Over 95 percent, I think, have resulted in no penalty.

Let me make one thing clear, I think there has been consistency and there is certainty. Why no Federal legislation? I think for a couple of reasons. One is, we're dealing with a very new area. We have not had evaluations in this area and to go in and legislate now, and I think potentially tie the hands and limit the discretion of law enforcement personnel, regulatory personnel, is not the most constructive thing. You have not been faced with abuses, certainly, in the Federal implementation of the policy.

With regard to the policy, let me make one thing very clear. We are 100 percent in favor of audits, of self-audits. We are 100 percent in favor of self-policing. We are 100 percent in favor of giving incentives to businesses that take it upon themselves to self-audit.

What we are not for, and what we don't think should be overlaid on our public policy is secrecy and immunity. Those have no place in good public policy. We have established privileges. They did develop in the common law. They are very special. I don't think that there is a reason to establish privileges in this area.

The fact is, thousands of companies are auditing. The fact is, according to a survey that was taken, the fact that there isn't a privilege doesn't dissuade them. You've heard conflicting things here about some States are being chilled while others aren't.

But the fact is, we think audits are good. We think companies are doing them, and we know that they're coming in and disclosing problems. I think we're dealing with them fairly.

Senator CHAFEE. Some are suggesting that if you don't have a statute, at least have a rule under the Administrative Procedures Act. But you haven't even done that. You have this policy. If I get the complaint, it's that you say it's definite, the others say no, it's not definite. That's the hitch.

Mr. HERMAN. I don't know that, I think even if you have a rule or you have a statute, there is going to be some amount of flexibility for, and I assume you want flexibility for your assistant attorney general, your assistant U.S. attorney, your EPA attorney, to implement these regulations and laws. Each case has some different factors.

One thing I would say is, certainly we are evaluating our policy. There are others evaluating the State laws. At this point, to lock something in, in stone, just seems very, very premature to me.

Senator CHAFEE. My time's up. Senator Baucus.

Senator BAUCUS. I wonder whether Mr. McBee, Mr. Wallach or Ms. Bangert have examples of where the EPA has left a self-auditor out to hang and dry because EPA has changed its policy.

Mr. WALLACH. Senator, do you mean are there examples where EPA has requested audit reports?

Senator BAUCUS. No, it's where a company has relied on EPA policy and then conducted the self-audit and then EPA has changed its mind and is much more strict with respect to that audit than the company was led to believe when it conducted the audit. I was looking for examples. The nature of the charge is, it's discretionary, it can change. I'm looking for examples where there has been change.

Mr. WALLACH. I would like to answer your question, and go back one step, though. Because with all due respect, I think it's a mistake to just focus on the EPA policy and the question of the indefiniteness or lack of indefiniteness.

Senator BAUCUS. Oh, I'm not going to just focus on that. I have many focuses. That's my one focus right now.

Mr. WALLACH. All right. The answer is yes, but it's very difficult to provide them, because they're essentially pending, they're either pending cases, the EPA has, I think, resolved for the audit policy a number of cases. I personally would categorize them as some of the easier cases. Others might disagree with me.

I think some of the more complicated cases are still pending. I can't tell you whether the company is going to be left high and dry or not. Clearly, some of the individuals involved in that, that provided the information, received no protections whatsoever.

Senator BAUCUS. What about Mr. Herman's point that this is really an evolving area? Isn't it premature for Congress to pass a statute?

Mr. WALLACH. I think Oregon passed its law in 1993.

Senator BAUCUS. Sorry?

Mr. WALLACH. Oregon passed its law in 1993.

Senator BAUCUS. That's true, but each State has different approaches. There are all kinds of different self-auditing laws that States pass.

District courts have, I don't know if this is the case, but I would assume have different views on all this, too. We're really in a new, evolving area here.

Mr. WALLACH. But Congress, as you know, has acted, in the Equal Credit Opportunity Act there was a privilege.

Senator BAUCUS. That's true, in a few cases. But the general rule is, Congress does not create privileges, evidentiary privileges. That's the general rule.

Mr. WALLACH. That's correct. We feel that the public policy reasons in this area are important enough that as the environmental protection goals are important enough that that's an issue Congress should consider.

Senator BAUCUS. Mr. McBee, I'm just curious, hasn't it worked out pretty well, in the final analysis, the Texas self-audit provisions, after working on it, the negotiations with EPA? I say that because I was astounded when you said that the earlier Texas version gave immunity to criminal——

Mr. MCBEE. Not complete immunity to criminal violations.

Senator BAUCUS. But still partial.

Mr. MCBEE. For criminal negligence.

Senator BAUCUS. For criminal. That's a bit much. You're getting to intent there, which is an area that I don't know should be protected. I'm glad that Texas has changed its statutes.

Mr. MCBEE. Senator, there are certain changes we made in Texas.

Senator BAUCUS. Didn't it work out OK?

Mr. MCBEE. We made some changes to the Texas law that I think, from a personal standpoint, improved the law. I have said that previously. What I think, well, two comments.

We have not yet seen if it has worked out these issues of delegation that I raised as what propelled us to come to the negotiating table are not yet resolved. There are petitions still pending against the State's delegated programs that have not been yet withdrawn by EPA. There are proposed programs for delegation that we have not received decisions on.

So I don't know yet if it's been adequately resolved in my view. That statute has been passed and we reached some accommodations. My view is, I would have preferred not to have been compelled to the negotiating table to take what EPA handed me, essentially, and to instead let State legislatures across the country experiment, if you will, to do what Mr. Herman said.

Senator BAUCUS. But what if the result of those State legislatures is significant reduction of environmental law enforcement? Doesn't the Federal Government have a responsibility to see that the Federal environmental laws are adequately enforced?

Mr. MCBEE. But it's my respectful view that what we have seen in Texas from 1995 onward was not a dilution of the enforcement capabilities of our State.

Senator BAUCUS. Immunity from criminal prosecution?

Mr. MCBEE. But again, Senator, the law in Texas was drafted to allow for any reckless conduct, any intentional conduct, to still be pursued in a criminal fashion. We were looking at a narrow range of criminal negligence. Again, that is, from a personal perspective, one of the changes in the Texas law that I believe improved our law.

Senator BAUCUS. But which EPA insisted upon.

Mr. MCBEE. They did. But there are other provisions, for example, the requirement to disgorge economic benefit that we don't find anywhere in statute or regulation at EPA that was also thrust upon the State of Texas. That is one, for example, where I have a different view as to whether that's absolutely the appropriate policy.

Senator BAUCUS. But do all three States, Mr. Wallach, would agree that the States should restore, the company should restore all economic gains derived from pollution? That is, I guess EPA's policy has non-gravity penalties, as I understand it. A fancy term, as I understand it, that is, penalties not above but the lost economic benefit.

Ms. BANGERT. Economic benefit, though, can be a policy decision as much as a legal decision. Whether a company has gotten any competitive advantage can very much be a policy determination, and a factual determination where the——

Senator BAUCUS. Well, I'm just talking about the general principle. I'm not going to get into each case, but just as a general principle.

Ms. BANGERT. What we found in a couple of the over-filings is that EPA has over-filed on the stated ground that the penalty was not high enough to deter future violations. That's a policy decision. It's also a decision that the State should determine, and not the people from Washington.

Senator BAUCUS. Mr. Herman, I thought EPA policy and its penalty policy was not deterrent but rather compensation, to make whole again. Did EPA level a fine above the economic loss in order to deter?

Mr. HERMAN. Not under the audit policy, Senator. No. What Ms. Bangert may be referring to is differences we had in other cases where, in Colorado, where we have over-filed and it's because we determined that the penalty was not appropriate.

Let me give you one example. One involved the Public Service case. There you had your opacity violations not corrected by the State, and the State allowed the company to gain an economic advantage worth several hundred thousand dollars.

The State assessed a fine of $4,000, and did not get any injunctive relief to ensure that the violations do not recur. The Sierra Club had filed a citizens suit alleging 19,000 violations over a 5-year period. We joined the lawsuit, we obtained a $2 million cash penalty and $2 million in supplemental environmental projects, which meant that the money went to make environmental improvements that actually went beyond compliance. That was not an audit case, but that's an over-filing case.

Senator BAUCUS. I see my time has expired. Thank you.

Senator CHAFEE. Senator Sessions.

Senator SESSIONS. Mr. Wallach, is it fair to say that the average business man or woman in America today does have fear about reporting, fear that the EPA will not be kind and gentle, but will utilize that information to disrupt their business and be very aggressive in punishment?

Mr. WALLACH. Senator, I think there are a lot of people that have that fear. I'm not sure I can say that the average person does. I think, for instance, EPA has not been entirely unreasonable in every enforcement situation we've seen. I think Steve Herman and the people he's brought in have tried to moderate it to some extent.

But you also have citizen suits, you have mass toxic tort actions, you have a whole spectrum of other things. So I think, yes, people do have that fear, and perhaps it's second only to the IRS in some respects. I think the more informed people have that fear even greater than the people who have been involved with it before, and the average businessman.

Senator SESSIONS. I'm not suggesting, I have a sense that if a government entity, city or whatever, reports, they're likely to get a fair hearing when it's all said and done. But I'm not sure they believe that. I think this legislation would help allay fears and give some certainty and confidence that would result in more audits and self-reporting. Is that your position?

Mr. WALLACH. I absolutely agree with that. I think the perception out there, in terms of Senator Baucus' question before, is that

unlike most Federal laws, and I was a prosecutor, a number of environmental laws, especially as interpreted by prosecutors, do not require specific intent or willful action. I think there is a tremendous concern out there by the regulated entities and the individuals in the front lines, even if it hasn't always happened, that that's going to happen to them.

So you're absolutely right.

Senator SESSIONS. Mr. McBee, let me raise this issue. I think fundamentally that the best argument we have against this bill is, maybe we ought to wait a bit and see how these laws work out. Second argument could be that there could be some technical improvements in it. Setting aside the first argument, let me ask you, Mr. Herman, would you be willing to review the bill for technical improvements and help make it a viable bill that you could support?

Mr. HERMAN. Senator, let me say this, because I have not seen Senator Enzi's bill yet. But let me say, I think there are other problems that are very fundamental. One of them is privilege and putting an overlay of secrecy.

Senator SESSIONS. Let's talk about that. What is being kept secret? Other than the internal work product that goes into the audit that wouldn't have been available if they hadn't reported the violation anyway, presumably. It's not a major secrecy benefit. The employees would still be subject to deposition. They would still be subject to being interviewed by EPA and FBI and other investigators. So the only thing is that just that work product within the audit, is there anything else?

Mr. HERMAN. It is the material that's there, and it can go to intent. You can have a situation where a farmer's groundwater, for instance, is damaged, is polluted. You find out that the next door neighbor, who was some regulated entity, knew that there was a problem because they had an audit 2 years before, but for economic reasons or some other reasons, they decided not to fix it. They delayed their trying to fix the problem.

You also have a situation in some of the statutes where, if somebody does an audit, they come in and then they go home. They're free. They don't have a penalty. They are immunized. I think that's very dangerous. It takes away accountability and responsibility.

The other thing I would urge you to do, because I know that you are a very, very experienced prosecutor, is look at these bills and see the machinations that you have to go through. I know that when I put together a case, I don't know exactly where the trail will lead.

Senator SESSIONS. I agree with that. One thing you said, you have to prove beyond a reasonable doubt that it was voluntarily disclosed. I think that's too high a burden on a prosecutor. It turns into a trial of a trial of a trial.

I have some technical concerns about it. I would just make this point. You've made——my time's up——you made four points in opposing this legislation. Almost all of them deal with secrecy. I think that's overblown. I think you can still interview every employee of that company, can't you, Mr. McBee? Still take their depositions?

Mr. MCBEE. Under the Texas law, Senator, materials required to be kept are not going to be privileged, nor is in-person observation of the violation privileged.

Senator SESSIONS. I don't think it's that big a deal. I think you could work something out we could live with that would perhaps further the improvement of the environment if we put our mind to it.

Senator CHAFEE. Thank you, Senator.

Senator Lautenberg.

Senator LAUTENBERG. Thanks very much, Mr. Chairman.

I want to ask you, Mr. Herman, does the right to know law that we've made frequent reference to and everybody's familiar with, is the information that the companies produce for the public record, is that material available for prosecution?

Mr. HERMAN. Yes, it is.

Senator LAUTENBERG. It is. So that we get very good response rates from companies, I know that we've seen it in New Jersey and I know that's also true across the country.

Mr. HERMAN. Yes.

Senator LAUTENBERG. Do you think, have there been cases brought, to your knowledge, under the right to know law against companies, citizen suits or otherwise, as a result of the revelation of information that they've put out?

Mr. HERMAN. I am aware we've had cases against companies that have not reported. We could certainly look into it. None come to mind.

Senator LAUTENBERG. I'd be interested in that. Because I wonder, especially Mr. Wallach here, an attorney with a distinguished background, you made the statement about the fact that under environmental law, there is less of a standard for willfulness conduct than there is under other laws. Did I understand you correctly?

Mr. WALLACH. That willful and intentional are not required for criminal convictions under the environmental laws, Senator.

Senator LAUTENBERG. Right. Is that true, Mr. Herman?

Mr. HERMAN. There are not always specific provisions. But I think if you look at how the law has been applied by Federal prosecutors around the country, only the most egregious cases have been brought as criminal actions. I don't know that the standard the prosecutors use is any different.

Senator LAUTENBERG. Mr. Wallach, do citizen suits represent a danger to business in our country?

Mr. WALLACH. I don't think the concept of the citizen suit, Senator, represents a danger to the business. But I think the purpose for which they were originally created and the nature of the environmental arena has changed. I think there are a lot of abuses right now in the citizen process. In fact, there's a case before the Supreme Court that's dealing with the question of citizen suits and whether they can sue for wholly past violations under statutes other than the Water Act, such as the TRI issue that they tried to take up there.

I'd like to get back to the one question you raised, though, which I think is critically important. The right to know law that you were so much involved in is a very, very important law. I think it has the benefits that you identified.

I think the concern that, as an example I wanted to give, if you do an aggressive audit and you miss something on a form that you submitted, but you do an aggressive audit, you go back and you find out it was entirely inadvertent. We had a malfunction in equipment, we didn't pick up that there was this release of compound of a quantity. It did go out into the neighborhood.

As soon as you find that out during your audit, you have a statutory obligation to report it. You cannot keep it privileged. The right to know law is not impacted whatsoever unless a company wants to willfully and intentionally go out and violate the law. You're not going to stop those people no matter what you do.

So I think this is going to get a lot more information out to the public. Because you're going to have companies aggressively pursuing every nook and cranny, and the individuals, more importantly, pursuing every nook and cranny. Inadvertent things will get out to the community.

Senator LAUTENBERG. There is that possibility. On the other hand, there's a distinct possibility that the privilege opportunity could be easily misused. I don't want to try to teach a law course here, I'm not a lawyer and I wouldn't have very good students out there. Considering the source of the information, I wouldn't expect them to be.

But we've seen cases now where attorney-client privilege has been extended far more than that. It appears in the discussions about tobacco that there was a refuge for data that wasn't to be released to the public that was cloaked under the attorney-client privilege statutes. So it's an easy place to conceal information, I think. I could be persuaded more if I thought that that information, maybe, and here I'm stepping into dangerous territory, maybe not available for prosecution, although as I understood it, the trail that's offered is often a very valuable asset in prosecution, if that condition could be developed where the information couldn't be used for further prosecution if the company voluntarily released it.

Would that then take away the need to cloak it under a privileged position?

Mr. WALLACH. That is one approach if it cannot be used at all for that. I think on the other hand, you could have other uses for it. If you are talking about all uses, citizen suits, mass tort actions and things like that, but that's something else I think that could be explored. Our position is for the very limited privilege, the qualified privilege, which is not very different in some respects from the deliberative process privilege that the Congress gave the Government under FOIA. So you have free flow of communications from within the Government and within regulated entities.

On the other hand, it would have significant benefits. It would really increase environmental protection.

Senator LAUTENBERG. Thanks, Mr. Chairman.

Senator CHAFEE. Thank you, Senator.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

I appreciate that you're allowing me to have access to the testimony and to be able to ask a few questions. It's very kind of you.

Senator CHAFEE. Go to it.

Senator ENZI. Mr. Herman, you mentioned that there were some 762 audits so far that have been agreed to. Can you give me any kind of an indication of how many of those were small business? We'll use maybe 100 employees as small business. That's very rough, so you can be very rough on the answer.

Mr. HERMAN. It is very rough. What I do know is——I will get you that information with preciseness for the record following the hearing. But my understanding and my review is that there is a good mix of both Fortune 500 companies and small companies.

I would also just point out that a couple of years ago, one of the first things I did after meeting with representatives of small business associations in Washington, they were brought in by our small business ombudsman at EPA, was to promulgate a policy for small business, which basically waives penalties when a small shop or whatever comes in and seeks assistance from us.

We have also set up compliance assistance centers in the printing sector, metal finishing, auto repair and agriculture, where small businesses can call in, get information. We've done this in cooperation with the trade associations. So the point I'm trying to make is that we are reaching out and we are trying to accommodate just the kinds of fears or injustices that I know you're concerned about.

Senator ENZI. I think I was rather complimentary to the agency when I started my statement and mentioned that you are doing a good job and that there's two and a half decades of good work. Your Web page is, incidentally, to be congratulated too. It has a lot of excellent help for small businesses again.

How many enforcement people do you have, roughly?

Mr. HERMAN. Roughly, across the country, including lawyers, criminal investigators, inspectors, scientists, it's probably 3,000 or so.

Senator CHAFEE. What did you say?

Mr. HERMAN. Three thousand. That includes Superfund.

Senator ENZI. How many of those would be inspectors?

Mr. HERMAN. A relatively small percentage. An unfortunately small percentage.

Senator ENZI. Earlier, in response to one of Senator Sessions' questions, you mentioned the person who had damaged a water well and then didn't disclose it. Wouldn't that be a criminal action?

I note that under the bill as I have proposed it, that would be criminal action. So there would be nothing privileged in that case.

Mr. HERMAN. I don't know whether or not it would be criminal. There certainly would be, if you had a suit by the farmer, forgetting about regulatory, but a result of some of these privilege laws is that if you had a suit of the individual farmer against the person who polluted his groundwater, certainly many lawyers would claim privilege as to the audit, which might show when the polluter knew that he was polluting. That could cause a problem.

Excuse me, if I could make just one other point, it's opening up a whole other area to litigation. In other words, everybody's concerned about the amount of litigation we have. This opens a whole new element to it, whether it's in camera proceedings or otherwise. That's one of the things I think we should try and guard against.

Senator ENZI. In the proposal that I have, of course, any information that's required to be given anyway has no privilege. Could you go into a little bit more explanation of what you mean by in camera doesn't help?

Mr. HERMAN. What I meant by, my concern about in camera is a couple of fold. No. 1, it's another proceeding that a prosecutor or a lawyer will have to go through to break through to get to see whether or not information is one, validly privileged once the privilege is claimed, No. 2, anybody that's been involved, I've been involved in some huge lawsuits. When you get into the discovery process, it can take, well, it can take months and months if not years.

This is something else. I think it was Senator Lautenberg who said about the use of the attorney-client privilege in the tobacco context. It is not that unusual. Now, we do, as Mr. Wallach said, you could use attorney-client privilege and it has been used in the environmental context. I don't think that's particularly good.

But attorney-client is at least a well established privilege, established over centuries. This, we're going into uncharted territory. I don't think, I guess——

Senator ENZI. Attorney-client is primarily available to those big companies. As Senator Sessions mentioned, what we're talking about is if the companies don't do an audit at all, there's no information available. We don't even know if there's a problem.

I see my time has expired, and I thank you, Senator Chafee.

Ms. BANGERT. Could I just add one thing?

Senator CHAFEE. Sure.

Ms. BANGERT. I want to add one thing about the poisoned well situation. That's ridiculous. Under Colorado law, if somebody poisoned a well and they did not correct that right away, the privilege wouldn't be available in the first instance. Disclosure immunity would not be available. I think that's carried through in Senator Enzi's bill.

Also just for the honor of Colorado, Mr. Herman mentioned the Public Service Corporation case. I think it's much more complicated than what he mentioned. I think the State had brought a case against Public Service under certain, for certain violations. I think EPA brought a case for other violations completely. So we're really comparing apples and oranges here when we do the 4,000 and the 1 million.

The State participated in the negotiations that got the $1 million fine. But I can give you more information.

Senator CHAFEE. Well, let's not debate the Colorado case here. Senator, if you've got a couple more questions, you go to it.

Senator ENZI. I appreciate the time. Thank you.

Senator CHAFEE. I've got a question here that I'm asking the panel. I'm going to read it.

One of the more serious charges leveled is that EPA is using information provided in State audits to target reporting companies. On page 6 of Mr. Herman's testimony it says, "The reality is that neither EPA nor the Department of Justice seeks audit reports as a means of identifying targets for civil or criminal prosecution. Further, I'm not aware of any case which a voluntary audit has been used to enforce, I presume to enforce means to bring an enforcement

action, against the company that discovered a violation on its own, disclosed and promptly corrected it."

Now, that's pretty definite. Both Mr. McBee, on page 6 of his testimony, and Ms. Bangert, on pages 10 and 11 of her testimony, seem to refute EPA's claim. I would assume they have used the information that's been brought forward.

Could you please try to explain the apparent discrepancy of the legitimate, non-audit reasons for Federal enforcement of these sites? I'll let you go first, Mr. Herman.

Mr. HERMAN. OK, I'll start with the definite statement that I made, which came as a result of basically the 19-month review that we did when we were formulating our own policy.

Mr. Wallach and Ms. Bangert participated actively in our deliberations as we got views from many different interests. We asked for examples, because we did a search of our files and we asked the Justice Department to do a search of their files to see whether or not we used audits, basically whether we went after the low-hanging fruit to see whether or not we should prosecute. There were no examples of that.

This is what we have said, and that's the basis of that statement. With regard to targeting companies that perform audits under the State audit laws, our policy is the same. It is not to target companies that do audits. However, it is not not to target them. In other words, they are not immune from review.

We do have a legitimate interest in seeing how States are administering their laws. Are they getting an appropriate penalty? Are they getting a correction of the environmental problem? Are they recovering in some cases the economic benefit? Was there a criminal violation?

We've done this in States that have and don't have audit statutes.

Senator CHAFEE. Mr. McBee.

Mr. MCBEE. Senator, it may be a question of semantics, to some extent, how we define target. The experience in Texas was while we were in the midst of these delicate negotiations between EPA and the State, as I noted in my testimony, letters were sent to five companies with respect to six facilities.

Those letters were, if you will, mirror images of what had been disclosed as a result of those companies' audits in the State of Texas. I interpreted that as a targeting of companies that had done audits and it was very easy to follow along. What was sought by EPA mirrored again exactly what was being conducted by the companies.

They did not, if I recall, did not ask for the audit reports themselves. But it was very clear what they were about, for whatever reasons they might have wished to explore that particular area. In Texas, those cases have not been brought to closure yet, although it is my understanding that penalties are being considered against one of the companies, which in my mind is the classic situation of why we need audit legislation in Texas and nationally.

This was a company that acquired this particular facility. Being I think a very good corporate citizen, came in and conducted a very aggressive audit to find the problems, and to fix those problems as they commenced operations at a new facility. I think that is good.

That is what we at the Federal and State level should induce and commend. Yet that company now, in my view, has faced targeting by EPA, and they face the possibility of penalties from EPA.

Senator CHAFEE. Ms. Bangert?

Ms. BANGERT. I return again to the Denver Water Board case. We had minor hazardous waste violations in the Denver Water Board case. We had discharges that were stopped immediately. We had structural changes made to the facility. We had long-term changes that went way, way, way beyond what EPA or the State could ever have ordered.

I can't imagine that EPA doesn't have better things to do with its time than to target a company in that situation.

Senator CHAFEE. All right, final word, Mr. Herman.

Mr. HERMAN. Thank you, Mr. Chairman. I would just say that there are two sides to every story, while the Denver Water Board case is an open matter, I would just say that I would not necessarily accept all of Ms. Bangert's characterizations of the facts in that case, and that they're being reviewed for the reasons that I've stated.

Senator CHAFEE. All right. Fine.

I want to thank all the witnesses very much. You've come some distance, several of you, and we appreciate the advantage of your testimony.

That concludes the hearing.

[Whereupon, at 12 noon, the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. MICHAEL B. ENZI, U.S. SENATOR FROM WYOMING

Mr. Chairman, I want to first thank you for giving me the opportunity to testify today on the issue of environmental audits. I have worked closely with this issue for many years. I was the prime sponsor of the Wyoming audit law that passed our State Legislature in 1995 by over a two-thirds majority, and it was a bipartisan vote. I am sure my friend and colleague from Wyoming who sits on this committee, Senator Thomas, recalls the vigorous debate that occurred in our State at that time.

When I got to Washington, several States that had audit laws were meeting with the EPA. The EPA was using threats of overfiling and delaying approval of State enforcement programs because of the State laws. Overfiling means the EPA could come in and use audit information as a road map for prosecution and levying fines. They can do this after a person has conducted an audit according to a State law after a business has taken on the expense and exposure in order to be sure they are not harming the environment. The EPA wanted us to change the Wyoming law—in spite of repeated assertions from our own State Attorney General that the law did not compromise our enforcement authority.

I want to point out that the Wyoming law is not extreme. In crafting it, I studied examples and results from other States that had gone through the process. I worked closely with our State Department of Environmental Quality and with members of the regulated community. I worked with various resource and conservation groups in Wyoming and we crafted a bill that provides very reasonable incentives for people to review their operations and cleanup the problems they find. We provided no criminal immunity or criminal privilege. We deferred to Federal laws wherever conflicts existed. And there was a consensus.

Not only did people have a chance to be involved in the process, but the debate itself raised the importance of a cleaner environment. It forced people to focus on the fact that our objective is to have a cleaner, safer environment—not to levy big fines.

Wyoming's scenario is not unique. It has happened in many other States and that has led me to offer this piece of legislation.

I do want to thank you, Mr. Chairman, and the Environment and Public Works Committee for holding this hearing today because the issue deserves congressional

attention. To date, twenty-four States have chosen to enact some form of environmental audit law and legislation is pending in sixteen other State legislatures. I would point out that eleven members who sit on this Committee come from States that have enacted audit laws. Another five members come from States where some form of legislation is pending.

Mr. Chairman, I did not want to spend a lot of time explaining the intricacy of audit laws because you have an expert panel of witnesses here today who can do a good job of that. But I do need to outline the process so I can discuss concepts for resolving the problems.

The purpose of audit laws are to provide incentives for regulated entities to search for and disclose environmental violations and to clean them up. The EPA argues that these entities are already required to be in compliance so we should not offer them incentives to clean up their violations. The point is that people conducts audits to find things they do not already know about. Many of them will never look for problems if they are threatened with fines for their good will.

Entities that can conduct audits range from businesses to schools, to hospitals, towns, and counties. The incentives can range from relief from penalties to protection of voluntarily gathered information. It is important to keep in mind a carefully crafted audit law ensures that audit protections apply only to good faith efforts—efforts that are voluntary, or "above and beyond" what is otherwise required by law. If we ensure that, then any disclosures are a net gain above traditional enforcement. They are a net gain for a safer, cleaner and healthier environment.

Consider for a moment the decisions a small business faces with regard to its environmental performance. Many small businesses are already required to monitor and report certain emissions. Audit protections do not cover those reports because they don't apply to any monitoring that is required by law. But consider a business that is not on an inspection schedule and has no required emissions reporting. If that entity wants to review its environmental performance, it would have to conduct a study. It would have to pay an auditor to come in and review its operations—that would be voluntary and it costs money. If it finds a violation, it must pay to clean it up. (Because if they find it and don't clean it up, they risk criminal activity). Once they report it, without audit protections, they could be fined and even taken to court.

So in deciding to conduct an audit, a person takes on a big risk. It is big enough so that most small businesses won't voluntarily undertake it. These folks choose instead to "take their chances" and wait for the inspectors. After all, only 2 percent of all regulated entities are on inspection schedules anyway. Just 2 percent, Mr. President.

How do we encourage the other 98 percent to really think about their environmental performance when we reward good will with fines?

That is the principle of audit laws. They recognize good faith efforts to make a cleaner, healthier environment. They encourage people to look for problems and know with certainty that they won't be penalized for their efforts.

The EPA has formulated an environmental audit policy that is working for some very large companies. It works well for companies with big legal departments that are used to negotiating with the EPA. It is often far easier for big business to use EPA's audit policy than to negotiate consent agreements, besides many of these companies use audits anyway. In fact, the EPA often cites the widespread use of audits as one of the reasons why we don't need State audit incentives. But they are missing the point. The objective of State audit laws is to *increase* the use of audits—to make them worthwhile for small entities as well as large ones.

The fact is, that small businesses and towns won't use the EPA's audit policy because it provides no certainty. Small businesses cannot afford costly environmental litigation from the EPA. (And I define small businesses as those with less than 100 employees). These people don't trust the EPA. They see the EPA Office of Compliance Assistance trying to help them out, while Criminal Enforcement across the hall is concocting ways to put them in jail—and they think those offices work together!

The principle of audit incentives is simple and reasonable. It is no surprise to me that so many State legislatures have chosen to enact some form of audit legislation. It is a positive tool that helps people understand and comply with environmental laws. It gives people a chance to ask questions without being penalized. It gives them the chance to figure out what they are doing wrong and fix it—without adding steep penalties to the cost of compliance.

Mr. Chairman, small business owners don't take time to read the thousands of pages of Byzantine regulations constructed here in Washington. They don't have time to read every law. They try to do what is right and avoid doing what is wrong. I know because my wife and I were small-business owners for twenty-six years. In

a small business, the owner is the same one who counts the change, helps the customers and vacuums the floor.

He or she has to stay in business, make payroll, and keep up with constantly evolving mandates from a never-ending supply of Federal attorneys. And while the small business owner has many jobs, these attorneys have *only one* job, to create and modify mandates and to investigate citizens. There are over 17,000 employees at the EPA and now, in spite of the rhetoric about reinventing regulations, the EPA wants funds for another 200 enforcement police.

We don't need more police to improve compliance—we need translators to interpret the regulations.

I would like to take a minute to explain my approach to the issue. The legislation I have introduced would provide a "safe-harbor" for State laws that fit within certain limits. It would not give authority to any State unless they go through the full legislative process, including all of the local discussion and debate that entails. That is a critical part of this process and something of value we should recognize. Keep in mind that State legislators and their families live in the places these laws will affect.

This bill would allow Congress to set the boundaries of the "safe-harbor" and determine what State laws may provide, such as:

• Limited protection from discovery for audit information—but only information that is *not* required to be gathered. All legal reporting requirements and permitting disclosures remain in effect and could not be covered by an audit privilege.

• A State audit law may provide limited protection from penalties if violations are promptly disclosed and cleaned up. Note, the protection will *not* cover criminal actions, and the law *must preserve* the ability of regulators to halt activities that pose imminent danger to public health.

• Third, if a State law falls within the "safe-harbor," the EPA would be prohibited from withholding State enforcement authority or overfiling against individuals simply because of the State's audit law.

• Lastly, the bill would require an annual State performance report that will help measure the success of different laws, so we can see what works and what does not.

I want to point out that this legislation will not dilute enforcement. There are safeguards to ensure that State audit laws always act to supplement—not to supplant existing enforcement. It is important to note that. Audits are an affirmative tool. Used properly, they can only be used to achieve an environment that is safer and healthier than the status quo. They do not protect any entity from regular inspection, sampling requirements or monitoring.

Some form of Federal legislation is necessary to provide the certainty our State laws need to be effective. I think it is a tragedy that the EPA has been so obstructive in giving States a chance to test reasonable and innovative solutions to a cleaner environment. Instead of promoting reinvention, the EPA is perpetuating an environmental race to mediocrity.

PREPARED STATEMENT OF STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY

I. INTRODUCTION

Thank you, Mr. Chairman, for the opportunity to testify on the topic of environmental auditing. Last summer, I testified before this committee on the Environmental Protection Agency's (EPA's) overall enforcement and compliance assurance program and EPA's enforcement relationship with the States. I am pleased that today's hearing provides an opportunity for me to testify in greater detail about EPA's self-disclosure policy, EPA's relationship with the States regarding State audit laws, and proposed Federal audit legislation. I firmly believe that EPA is pursuing the right course in this area.

I want to make three points today:

(1) EPA supports environmental auditing and other forms of self-policing and has an effective policy in place to encourage such conduct.

(2) Audit privilege and immunity legislation is not only unnecessary, but it is unwise because it undermines law enforcement, impairs protection of human health and the environment, and interferes with the public's right to know of potential and existing environmental hazards.

(3) EPA has been and is working with States to ensure that at least the statutory minimum enforcement and information gathering authorities are maintained by all States implementing a Federal environmental law.

II. EPA SUPPORT FOR ENVIRONMENTAL AUDITING AND OPPOSITION TO AUDIT PRIVILEGE AND IMMUNITY LAWS

EPA strongly supports environmental auditing and use of compliance management systems by regulated entities to improve compliance and prevent and reduce pollution. Self-auditing can result in the prompt detection and correction of violations as well as the identification of potential future violations that can be averted through preventative measures. Companies that conduct audits or use compliance management systems thus safeguard and improve public health and the environment. In addition, because government compliance and enforcement resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police itself. Where more companies find and correct their own violations, scarce government resources may be focused on higher risk violators.

Accordingly, it is important for government to encourage environmental auditing, but it must do so without compromising the integrity and enforceability of our environmental laws. Approaches—including legislation—that guarantee amnesty for environmental violators and promote the secrecy of environmental compliance information damage the credibility and effectiveness of the Nation's environmental enforcement program, are unnecessary and, in the final analysis, undermine the integrity of incentives for responsible business.

EPA's approach to environmental auditing is designed to further some key principles of this Administration's environmental enforcement program.

First, industry and government both bear certain responsibilities in achieving compliance. Industry has a responsibility to stay in compliance with the law. Government must maintain an enforcement program that punishes wrongdoers, deters potential violators, brings violators into compliance, and ensures that damage to the environment is rectified. Government should give credit to industry's good faith efforts to comply, but it must do so without compromising its ability to enforce environmental obligations firmly and fairly. The public and law-abiding regulated entities rightly expect EPA to take strong enforcement action against polluters.

Second, business earns the public trust by being open with government and the public at large. Openness is an essential component of corporate accountability.

Third, EPA fully recognizes that it shares with all levels of government a common interest in environmental protection and compliance with environmental requirements. The Federal and State relationship must be guided by recognition of the delegated State's primary responsibility for running a strong enforcement program and the benefits of a well-defined Federal role as national environmental steward. In its Federal role, EPA safeguards the national standards for environmental protection for all citizens and also maintains a level playing field for law abiding companies—regardless of their location.

Fourth, environmental compliance incentives must reflect the legitimate interests of the public, the regulated community, and local, State, and Federal officials who enforce the law. Incentives in the form of legislative privilege and immunity have proved divisive and are opposed by many local, State, and Federal prosecutors, environmental agencies, and citizens concerned about environmental pollution.

A. EPA's Self-Disclosure Policy

In 1995, EPA issued its policy, "Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations" (60 Fed. Reg. 66706 (Dec. 22, 1995)). The policy was the result of an intensive eighteen-month public process designed to identify the best way to encourage companies to police themselves while preserving fair and effective enforcement and the public's access to information. EPA's policy reflects input from State attorneys general and local prosecutors, State environmental agencies, the regulated community, public interest organizations, and the Department of Justice. It has won praise from industry and environmental groups, and from local, State, and Federal law enforcement officials. Eighteen State attorneys general and environmental commissioners declared their support because EPA's policy effectively encourages self-policing while maintaining safeguards to protect the public and the environment. See Exhibit 1.

How does EPA's self-disclosure policy work? It carefully balances auditing incentives with protections for law enforcement, human health and the environment, and community right-to-know. Where violations are discovered through an environmental audit or compliance management system and the full conditions of the policy are met, EPA will: (1) eliminate gravity-based civil penalties (*i.e.*, the penalty amount over and above the company's economic gain from non-compliance); and (2) not recommend criminal prosecution so long as there is no high-level corporate involvement or a prevalent management practice to conceal or condone violations. In

addition, EPA commits not to make requests for audit reports to initiate civil or criminal investigations.

EPA's conditions for granting these benefits are based on common sense and sound public policy. For example, companies must promptly disclose and correct the violation, prevent recurrence of the violation, remedy any environmental damage, and provide such information as is necessary and requested by EPA to determine the applicability of the policy. Exceptions for individual criminal conduct, repeat violations, violations of consent orders or agreements, and violations that present an imminent or substantial endangerment or result in serious harm protect human health and the environment. EPA retains its discretion to recover economic benefit gained as a result of noncompliance so that companies will not obtain an economic advantage over their competitors by delaying their investment in compliance.

Business has been receptive to the EPA self-disclosure policy and has come forward, rectified problems, and avoided prolonged and expensive litigation. To date, more than 225 companies have disclosed and corrected violations under the policy at more than 700 facilities. Disclosing companies run the gamut, ranging from large Fortune 500 companies to small businesses, from a wide variety of industrial sectors. See Exhibit 2.

Earlier this month, the agency and GTE Corporation reached an agreement under the policy, resolving 600 Emergency Planning and Community Right to Know Act (EPCRA) and Clean Water Act Spill Prevention Countermeasure and Control (SPCC) violations at 314 GTE facilities in 21 States. Correction of these violations will protect communities and firefighters, police, and others in the event of a chemical spill or release, and will help to lessen the likelihood that hazardous chemicals will pollute our waterways. The company will pay a $52,264 penalty, equal to the amount of money saved during its period of non-compliance. Because the company voluntarily disclosed and corrected the violations, EPA waived another $2.38 million in assessable penalties. After discovering non-compliance at several facilities, GTE promptly notified EPA of the violations pursuant to EPA's self-disclosure policy and undertook a company-wide audit at 10,000 sites nationwide. This settlement demonstrates the self-disclosure policy's broad scope in promoting compliance at facilities nationwide.

In addition, States including California, Connecticut, Delaware, Florida, Maryland, North Carolina, Oklahoma, Pennsylvania, Tennessee, Vermont, and Washington, have designed their own self-disclosure policies, thereby providing incentives while maintaining enforcement authority.

B. EPA's Opposition to Audit Legislation

Let me now turn to the topic of audit legislation. As I have stated on many occasions, EPA strongly opposes audit privilege and immunity legislation. Audit privilege and immunity laws restrict governments' ability to obtain injunctive relief and penalties to address violations affecting human health and the environment, and to obtain evidence necessary for enforcement. Audit privileges invite secrecy, complicate criminal and civil discovery and trials, and impede public access to information. Let me explain.

While EPA supports penalty mitigation as an incentive for voluntary disclosure and correction of violations, EPA believes that immunizing violations—including serious violations—discourages companies from making the investments in pollution control necessary to prevent such violations. We also oppose immunity because it undermines deterrence and the rule of law. Strong environmental enforcement provides an incentive for responsible behavior, not immunizing violations.

EPA opposes audit privileges for a number of reasons. First, such privileges invite secrecy, instead of the openness needed to build public and government trust in industry's ability to self-police to protect human health and the environment. Second, audit privileges weaken law enforcement necessary to protect human health and the environment by making relevant information unavailable to government prosecutors and civil enforcers, and by erecting procedural barriers to access this information. Audit privileges, particularly when law enforcers may be legally constrained from using any evidence derived from the audit report, interfere with the investigation of environmental crimes. Why should we make it easier for violators and harder for our local, State, and Federal law enforcement officials?

Third, audit privilege laws impede public access to information concerning environmental hazards. Such laws undermine one of this Administration's priorities—public right-to-know. When informed, the public can actively and intelligently participate in its own environmental protection.

Fourth, some audit privilege laws penalize employees who report known or potential environmental concerns to law enforcement authorities. Such sanctions conflict with Federal laws preserving employees' rights, have a chilling effect on employee

disclosures of illegal conduct, and hamper enforcement. Why would we want to discourage the disclosure of illegal activity?

Yet another reason why EPA opposes audit privilege is that it is simply unnecessary. Environmental auditing has increased to the point where it is already standard practice for 75 percent of corporations responding to a 1995 survey by Price Waterhouse, and is growing among the remaining 25 percent as well. Most companies do not view privilege as a precondition to conducting auditing—they see good business reasons for auditing. A privilege is unnecessary.

Businesses also view the types of incentives in EPA's self-disclosure policy as effective in motivating auditing. Of respondents to the 1995 Price Waterhouse survey, over 40 percent said that penalty mitigation for self-identified, reported, and corrected violations would encourage the company to conduct more auditing. About the same number viewed a presumption against corporate criminal prosecution as encouraging auditing. In the same survey, 96 percent of the corporate respondents who conduct audits said that one of the reasons that they did so was to find and correct violations before they were found by government inspectors. Thus, legislation that impairs enforcement, like audit privilege legislation, may actually decrease the amount of auditing, as well as decrease the incentives for prompt correction of violations.

Finally, proponents of audit privilege legislation sometimes contend that companies need an audit privilege to protect them against overzealous environmental law enforcement. The reality is that neither EPA nor the Department of Justice seeks audit reports as a means of identifying targets for civil or criminal prosecution. Furthermore, I am not aware of any case in which a voluntary audit has been used to enforce against a company that discovered a violation on its own, disclosed, and promptly corrected it.

These are among the many reasons why audit privilege is so adamantly opposed by a bipartisan coalition of State attorneys general that includes Republicans like Grant Woods of Arizona and Dennis C. Vacco of New York, as well as Democrats like Scott Harshbarger of Massachusetts and Christine O. Gregoire of Washington. No wonder the Governor of New York has announced his opposition this year to environmental audit privileges, and the Governor of Idaho has announced that he will allow that State's privilege and immunity law to expire at the end of this year. The National District Attorneys Association, the California District Attorneys Association, and the New York State District Attorneys Association have long expressed opposition to audit privilege and immunity legislation. I strongly encourage you to solicit the views of the broad range of local, State, and Federal law enforcement and environmental officials who oppose enactment of audit privilege and immunity legislation. See Exhibit 3.

III. EPA-STATE DIALOGUE

The Federal environmental statutes recognize the necessity and importance of the Federal Government's role in ensuring that baseline national standards established by the environmental laws to protect human health and the environment are implemented and enforced fairly and consistently in all States. To reinforce that goal, Federal law also authorizes citizens to petition EPA to review or withdraw State programs on the grounds that the States lack the enforcement authority necessary to meet federally established standards.

EPA's opposition to the enactment of State audit privilege and immunity laws is based on policy considerations as well as law. On the policy level, EPA strongly opposes enactment of audit privileges because they shield evidence of wrongdoing and run counter to the State and Federal partnership in encouraging the kind of openness that builds trust between regulators, the regulated community, and the public. EPA opposes immunizing violations disclosed in audits because they discourage investment in pollution control and undermine deterrence.

As to the legal issue, EPA must ensure that the enactment of State audit laws does not impair the State's ability to adequately enforce its environmental laws and to gather information necessary to monitor and ensure compliance, and that such laws do not interfere with the public's access to information. EPA may not approve, delegate, or authorize any new Federal program unless it determines that such authorities are adequate.

These requirements are not new, and were not developed just to oppose audit laws. They have been part of the program approval process for many years.

Federal statutes and regulations require States and the public to have access to environmental compliance information. A State must have the ability to obtain information needed to identify and assess noncompliance and criminal conduct, and ensure correction of violations.

Public access to information must be preserved and remain consistent with the provisions of Federal statutes granting citizens the ability to participate in permitting and enforcement proceedings to ensure adequate environmental protection. The State also may not sanction "whistle blowers"—employees who divulge information about a company's noncompliance.

Federal statutes and regulations require that States maintain authority to obtain injunctive relief and civil and criminal penalties for any violation of Federal program requirements. As reflected in the "Statement of Principles," which was issued by EPA on February 14, 1997, EPA is particularly concerned with whether a State has the authority to obtain immediate and complete injunctive relief; to recover civil penalties for significant economic benefit, repeat violations and violations of judicial or administrative orders, serious harm, and activities that may present an imminent and substantial endangerment; and to obtain fines and sanctions for criminal conduct.

Although EPA strongly believes that environmental audit privilege and immunity laws can only impair the government's and citizens' ability to monitor and enforce the laws and to protect communities from environmental threats, the agency has worked with States to modify their State audit privilege and immunity statutes to meet the minima necessary to comply with Federal laws designed to ensure a floor of enforcement and public access to information. For example, EPA's discussions with the States of Utah and Texas have resulted in changes to their laws that were acceptable to those States and that also met the minimum Federal requirements for enforceability and public access. We are ready to do the same with other States as well. However, EPA will continue to oppose enactment of State audit privilege and immunity laws because of their adverse impacts on State environmental enforcement and community right-to-know.

IV. NEW PROJECTS EVALUATING THE EPA SELF-DISCLOSURE POLICY AND STATE AUDIT LAWS

I am pleased to announce that EPA has initiated two new projects to evaluate the effectiveness of various State audit laws and policies, and the EPA self-disclosure policy. The time line for completion of both projects is one year to eighteen months. These projects should form a valuable information base from which to evaluate EPA's experience to date under its self-disclosure program and whether any Federal legislation is needed.

EPA recently awarded a grant to the National Conference of State Legislatures (NCSL) to conduct surveys of State officials and facility owners and operators to obtain objective data on the amount and type of audit activity being performed in States with audit laws, audit policies, or neither a law nor a policy.

In addition, EPA will soon begin compiling information to prepare a report on the effectiveness of the EPA self-disclosure policy. The report will evaluate the effectiveness of the policy in encouraging regulated entities to voluntarily discover, disclose, correct, and prevent violations of Federal environmental requirements.

V. FEDERAL AUDIT LEGISLATION

I strongly believe that Federal audit legislation will not strengthen America's environmental programs at this time. As described above, audit privilege and immunity laws encourage secrecy, impede environmental law enforcement, and limit public access to environmental hazard information.

There is no real need for Federal audit legislation of any kind. Environmental auditing is already widespread and is growing without Federal audit legislation. Abusive use of audits in enforcement just does not exist. Finally, as I have suggested throughout my testimony, EPA's self-disclosure policy reflects the proper balance of incentives for auditing and protections for human health and the environment. It is clearly appropriate to analyze each case individually to determine what type of enforcement action, if any, is appropriate for a given violation. It is impossible to categorize all the possible factors in advance through legislation. Attempting to do so will only create litigation burdens in those enforcement actions brought to protect human health and the environment.

S. 866, an audit privilege and immunity bill introduced in this Congress, reflects many of the serious problems with audit privilege and immunity legislation which I've outlined today and in previous testimony. If enacted, the bill would weaken law enforcement, promote secrecy at the expense of the public's right to protect itself, endanger human health and safety, and erode environmental protection. Let me explain.

How does S. 866 weaken law enforcement? The bill generally conceals from law enforcers information placed in an audit report and testimony about an audit. This

privilege would hamstring effective law enforcement, especially criminal investigations and prosecutions. The privilege and immunity provisions would apply even to criminal conduct, and violations causing an imminent and substantial endangerment or serious actual harm. The bill would also make it harder to prosecute criminals by requiring the government to prove that the defendant had the specific intent to violate or disregard the law. Congress has not required a specific intent standard throughout our existing environmental laws.

S. 866's repeat violation exception to immunity gives multiple bites at the compliance apple. A company must violate the same requirement repeatedly over a three-year period and each time incur an enforcement action to be excepted from blanket immunity. Given the speed with which courts operate and the fact that most violations are resolved without resort to formal enforcement, this is no exception at all. In addition, under S. 866, regulated entities receive amnesty for violations that are required to be monitored and reported. This effectively writes prompt compliance with these provisions out of the environmental laws, and deprives the State and the public of the information they need to ensure compliance.

How does S. 866 promote secrecy at the expense of the public's right to protect itself? The bill fails to protect public access to information. Citizen plaintiffs seeking to enforce environmental laws or obtain a remedy for a toxic release will not have access to needed information. In fact, information will not be available to the public even if it is the only evidence of the cause of an environmental problem or the extent of environmental harm (like fish kills, groundwater contamination, or contaminated soil).

How would S. 866 endanger human health and erode environmental protection? The bill allows privilege and immunity regardless of the seriousness of the environmental or human health harm caused by failure to comply. It grants a privilege and provides immunity from prosecution even if the violations are not actually corrected. Under the bill, compliance with applicable environmental requirements is not required, only initiation and pursuit of efforts to comply. There is not even an explicit obligation imposed on regulated entities to remedy any environmental or human harm caused by the underlying violations.

Most significantly, this bill encourages States to lower environmental standards to compete for business at the expense of human health and the environment. S. 866 endorses State privilege laws, with the sole specified exception of making the privilege inapplicable to violations required to be disclosed. This could mean that many violations, regardless of whether they've been corrected, caused environmental harm, were intentional, or went uncorrected for months or even years, could be kept secret from law enforcers and the public. S. 866 also endorses State immunity laws without specified exception. States could immunize criminal conduct, ongoing violations, even environmental catastrophes, and still receive Federal program approval and Federal dollars. Under S. 866, a company also retains any amount of economic benefit gained from noncompliance. Adherence to the law is directly undermined by provisions like these.

Human health is also jeopardized under the bill because the default provision in S. 866 not only gives immunity for violations causing serious actual harm, but also gives immunity to all violations—no matter how egregious—if the government fails to challenge a disclosure within 60 days.

The bill offers plenty of work for lawyers at the potential expense of taxpayers. Law enforcement personnel will be forced to litigate ambiguous definitions and standards for application of privilege and immunity, delaying or preventing important decisions that impact human health and the environment.

Let me suggest just a few concrete examples of how S. 866 would seriously erode our environmental enforcement efforts.

> *Scenario One:* An audit reveals that the plant manager submitted falsified monitoring reports to an environmental agency. The company submits a corrected report. *Result:* Evidence of past criminal conduct in the audit would be inadmissible in an action against the plant manager as would testimony concerning the findings in the audit.
>
> *Scenario Two:* An audit recommends replacement of aging equipment. The company fails to act on the recommendation. The equipment breaks down and releases hazardous waste into the environment. A neighboring farmer's well is contaminated. *Result:* The company's failure to act would not be available as evidence in an enforcement action to determine the cause of the problem or the extent of the harm nor would it be available to the farmer whose groundwater was contaminated by the release. Citizens would not be allowed to use this evidence to recover damages, regardless of the harm to them and their families. The government also could not use the information in an enforcement action,

despite the fact that the company had sufficient knowledge to prevent the harm, but simply ignored it.

Scenario Three: A criminal investigator receives a tip that waste is being disposed of illegally. *Result:* If the investigator follows up and finds out that the informant received the information from an environmental audit, the midnight dumpers may be able to escape prosecution altogether because of the "tainted" evidence or some of the most damaging evidence could be excluded from the trial. Even if a company finds a longstanding violation that it could have and should have avoided using available pollution control equipment, it can disclose that violation and receive amnesty.

Tragically, some of the concerns about how audit laws would endanger human health and the environment expressed in the three scenarios may be found in actual cases. In Arkansas, in a suit brought by citizens, the El Dorado Chemical Company attempted to use the State audit privilege law to shield environmental impacts information from local citizens—including children—who allegedly suffered numerous respiratory ailments when subjected to repeated contamination from ammonia, sulfuric acid, and other air pollutants. Similarly, at a landfill near Amarillo, Texas, Browning-Ferris, Inc. (BFI) succeeded in persuading a State administrative law judge to prevent disclosure of two environmental audits that local citizens were seeking in order to document an alleged imminent and substantial endangerment as a result of contaminated groundwater.

Such cases must not occur in Federal proceedings due to enactment of Federal audit legislation.

VI. CONCLUSION

In conclusion, I urge that the current Federal approach to environmental auditing be allowed to continue. Under the EPA self-disclosure policy, EPA gives credit to good faith efforts to comply, without compromising fair and effective enforcement or jeopardizing government and public access to crucial compliance information. Recent GTE disclosures illustrate how the policy makes good environmental and business sense. We support the States' efforts to promote compliance and innovation, but we also must work to ensure that States maintain effective enforcement programs which accommodate the interests of all—businesses; local, State, and Federal regulators; and citizens—and which ensure a level playing field for law-abiding companies nationwide.

Thank you again for the opportunity to testify before your committee. I would be happy to answer any questions.

STATE SUPPORT FOR EPA AUDIT POLICY

"The policy encourages responsible self-policing by greatly reducing potential penalties and minimizing the risk of criminal prosecution for companies and other regulated parties that use audits or other means of discovering violations of environmental requirements, promptly report the problems, and expeditiously correct the problems.

Equally important, the policy accomplishes this purpose while preserving the right of government officials to protect public health and the environment by enforcing in cases involving the most serious types of violations, as well as the right of the public to know the nature of compliance problems disclosed under this policy and the actions taken by the agency in response to the disclosures made."

January 26, 1996 letter to EPA Administrator Carol Browner
from Attorneys General or Environmental Commissioners from
Alaska, Arizona, Connecticut, Florida, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, New Jersey, New York, North Carolina, Oklahoma, Tennessee, Washington, Wisconsin.

EXHIBIT 1

ROUGH BREAKDOWN OF INDUSTRY DISCLOSURES UNDER FEDERAL AUDIT POLICY

Industry Sector	Number of Facilities Disclosing Violations
Die casting	1
Defense	4
University	1
Environmental Services	4
Printing	1
Pharmaceutical	7
Construction	5
Energy (oil and gas)	246
Chemical Manufacturing	38
Household Goods	22
Machine Manufacturing	3
Steel	11
Scrap Metal	1
Electronic Equipment	15
Pesticides	3
Auto Parts	13
Packaging	3
Textiles	1
Dry Cleaners	1
Metal Manufacturing	2
Communications	319
Transportation	7
Federal Facilities	3
Pulp and Paper	4
Paint	2
Mining	1
Plastics	1
Food Food Processing	4
Miscellaneous Other	39
TOTAL	762

EXHIBIT 2

OPPOSITION TO AUDIT PRIVILEGE AND IMMUNITY LEGISLATION

Federal Law Enforcement Officials

U.S. Attorneys: Alaska, Louisiana, Kansas, Tennessee, West Virginia, Florida, California, Missouri, Maryland, Alabama, Michigan, Delaware, South Carolina

State Officials

Attorneys General: Alabama, Arizona, California, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Wisconsin

Environmental Commissioners: Missouri, New Jersey, New York

Governors: Alaska, Idaho, New York

Local Law Enforcement

District Attorneys Associations: National District Attorneys Association; CA District Attorneys Association; NJ County Prosecutors Association; NY District Attorneys Association; TN District Attorneys Association

District and County Attorneys: Richmond County, New York; Suffolk County, New York; Los Angeles County, California; Alameda County; Maricopa County, Arizona, Attorney; Morris County, New Jersey; Missoula County, Montana, Attorney; Lexington, South Carolina, Solicitor; 20th Judicial District, Nashville, Tennessee

Environmental and Public Interest Groups & Coalitions

Opposing State Legislation: Alaska Center for the Environment, Sierra Club (Colorado and Ohio), Michigan Environmental Council, Western Colorado Congress, High Country Citizens Alliance (Colorado), Louisiana Environmental Action, Natural Heritage Institute (California), Ohio Citizen Action, Northwest Environmental Advocates, Richard Lowerre, Southern Environmental Law Center (North Carolina)

Opposing National Legislation: Chesapeake Bay Foundation, Good Neighbor Project, Western Organization of Resource Councils, Trial Lawyers for Public Justice, Earthlaw, U.S. Public Interest Research Group, Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, Earth Justice Legal Defense Fund, National Wildlife Federation, Government Accountability Project, Rural Coalition, 20/20 Vision, Greenpeace USA, Center for Marine Conservation, Physicians for Social Responsibility, Cook Inlet Keeper, Alaska Forum for Environmental Responsibility, Alaska Clean Air Coalition, Alaska Center for the

Environment, Alabama Rivers Alliance, Alabama Environmental Council, Planning and Conservation League, Environmental Defense Center, Earth Island Institute/Bluewater Network, Klamath Forest Alliance, California Communities Against Toxics, Phred Records, Oil, Chemical and Atomic Workers Union, Western Colorado Congress, Long Island Soundkeeper Alliance, University of Delaware Student Environmental Action Coalition, Glynn Environmental Coalition, Georgia Chapter of Sierra Club, Iowa Chapter of Sierra Club, Izaak Walton League of IA, Idaho Conservation League, Idaho Rural Council, Uptown Recycling, Inc., Republicans for Environmental Protection, Valley Watch, Inc., Kansas Chapter of Sierra Club, Kentucky Resources Council, Inc., Democracy Resource Center, Tulane Institute for Environmental Law and Policy, Delta Greens, Gulf Restoration Network, Pollution Solution, Louisiana Coalition for Tax Justice, Greater Boston PSR, Watershed Defense Fund, Woods Hole Oceanographic Institute, Massachusetts Chapter of Sierra Club, National Environmental Law Center, Safer Waters in Massachusetts, Environmental Research Foundation, Ozark Chapter of Sierra Club, Assateague Coastal Trust, Maryland Conservation Council, Michigan Environmental Council, Ecology Center of Ann Arbor, Tip of the Mit Watershed Council, The Minnesota Project, Mississippi 2020 Network, Montana Coalition for Health, Environmental and Economic Rights, Western Organization of Resource Councils, Northern Plains Resource Council, Native Forest Network, Conservation Council of North Carolina, Concerned Citizens of Tillery, North Carolina Coastal Federation, Dakota Resource Council, New Jersey Environmental Lobby, New Jersey Chapter of Sierra Club, University of New Mexico, Citizen Alert, Great Lakes United, Action for the Preservation and Conservation of the North Shore of Long Island, Fish Unlimited, Hudson River Sloop Clear Water, Fulton Safe Drinking Water Action Committee for Environmental Concerns, Inc., Ohio Citizen Action, Rivers Unlimited, Oregon Shores Conservation Council, Northwest Environmental Advocates, Physicians for Social Responsibility, Raymond Profitt Foundation, Pennsylvania Chapter of Sierra Club, Keystone Action Network, Lone Star Chapter of Sierra Club, Citizens League for Environmental Action and Recovery, Galveston-Houston Association for Smog Prevention, Citizens Aware and United for a Safe Environment, People Against Contaminated Environments, Citizens Environmental Council of Channelview, the Chemical Connection, Downwinders at Risk, Groups Allied to Stop Pollution, Citizens to Save Lake Waco, North Channel Concerned Citizens Against Pollution, Citizens Against Local Landfills, Environmentally Concerned Citizens, Texans United, Citizens Environmental Coalition, Friends Insist Stop Toxic Waste, Mothers for Clean Air, All Friends United, Houston Group of Sierra Club, Friends United for a Safe Environment, Center for Health, Environment and Justice, Washington Toxics Coalition, Inland Empire Public Lands Council, Wise Use Movement, Citizens for Safe Water Around Badger, Powder River Basin Resource Council, Markham Center, Education Access - West, Desert Citizens Against Pollution, Hi-Desert Citizens Against Pollution

REPRESENTATIVE STATEMENTS OPPOSING AUDIT PRIVILEGE AND/OR PENALTY IMMUNITY LEGISLATION

For release: Immediate
Thursday, Jan. 30, 1997

Contact: Gary Sheffer
(518) 457-5400

CAHILL ANNOUNCES PLAN TO ENHANCE ENVIRONMENTAL ENFORCEMENT

State Department of Environmental Conservation (DEC) Acting Commissioner John P. Cahill today announced a six-point plan to bolster enforcement of environmental laws in New York State, building on Governor George E. Pataki's success in making New York State a leader in environmental protection.

"The Pataki Administration has led the nation for two years in developing innovative environmental protection policies," Cahill said. "As we implement other major environmental initiatives, such as the Clean Water/Clean Air Bond Act and the New York City watershed agreement, we also must enhance New York's enforcement efforts."

Earlier this month, Governor Pataki asked Cahill to review DEC's enforcement policies and to recommend opportunities for improvement. The resulting plan adds 15 new DEC employees for enforcement that will be paid for from a 30-day budget amendment to be introduced by Governor Pataki. The Governor previously had announced that the amendment would provide an additional $1 million in 1997-98 for new DEC personnel. Cahill said the Governor will add $400,000 to that for the new enforcement staff.

"Protecting New York's air and water is an immense responsibility and Governor Pataki has, once again, provided the leadership and the resources to get the job done," Cahill said.

Cahill said the new employees will be technical staff that will be out in the field performing inspections and coordinating enforcement.

"These steps demonstrate New York's ongoing commitment to firm enforcement of environmental laws and regulations, while ensuring that they are applied fairly and consistently," Cahill said. "Vigorous environmental enforcement helps business by creating a level playing field for honest business people. Violators must be punished appropriately and cannot be allowed to gain an economic or competitive advantage because of their

violations and the types and locations of environmental benefit projects; and

-- requires that environmental benefit projects be performed within a 25-mile radius of the violation(s) that led to the projects.

Cahill said, "The Environmental Benefit Project Policy can be a useful enforcement tool that provides tangible benefits to the environment and natural resources of communities where environmental damage has occurred. To be effective, environmental benefit projects must directly benefit the environment and have a clear relationship to the violations."

The proposed policy changes will be published in the Feb. 11 Environmental Notice Bulletin. DEC will accept comments from the public through March 10.

* **Opposes audit privilege for violators.** Cahill said the Pataki Administration is opposed to environmental audit privilege proposals that protect regulated entities from disclosing violations revealed in internal audits.

"This kind of policy erects barriers between environmental agencies and the regulated community," Cahill said. "It would reduce the flow of information to regulators and the public."

Instead, the administration supports policies providing for the potential of reduced penalties to those who quickly report and correct violations, consistent with the approach taken by EPA.

Cahill said the administrative changes identified in the enforcement plan will be implemented as soon as possible.

"No one should mistake this for a return to the arbitrary enforcement policies of the previous administration," Cahill said. "Environmental enforcement cannot be a goal unto itself. The real goal of any environmental enforcement policy, and the goal of this administration, is to protect our air, land and water.

TESTIMONY OF ATTORNEY GENERAL JAMES E. DOYLE
IN OPPOSITION TO AB 235

April 29, 1997

The Attorney General opposes this bill because it takes control of the law and its enforcement away from the people of Wisconsin and because it requires that violators of that law--polluters of our air, land and water--go unpunished. The bill rewards repeat violators who stagger their violations, lets criminals go free, and punishes good citizenship and ethical behavior. What the bill does not do is help companies clean up, come into compliance, and prevent pollution.

The problem is that compliance and pollution prevention do not seem to be the goal of this bill. Self-auditing is a tool, not an end in itself. Other states have found that more audits have been done upon passage of bills like this one, but that disclosures do not follow because the companies do not want to clean up or come into compliance. The key is facilitating corrective action, through regulatory initiatives like greater flexibility in permitting and achieving standards and working with an industry as a whole, through legislative programs like PECFA and the Land Recycling Act, through technical assistance like that offered by the UW Extension Solid and Hazardous Waste Education Center, through stepped enforcement and the exercise of enforcement discretion not to prosecute companies that cooperate, and through the offsetting of forfeitures for auditing and future cooperation.

If the goal is to achieve constructive working relationships between government and regulated entities, the alternatives mentioned above, not this bill, will do it and have done it. If the goal is to produce better environmental results, those alternatives, not this bill, will do it and have done it. Indeed, the two enforcement policies listed at the end of the previous paragraph are precisely the policies that have been practiced by DNR and DOJ, and only the bad actors who have not benefited from those policies stand to benefit from a bill such as this.

If the goal is to free companies from excessive punishment, there is no basis for the bill. Indeed, at a recent Milwaukee business seminar on environmental compliance, a speaker from a prominent large business in Wisconsin was asked (by a lobbyist for that business), "Isn't the fact that Wisconsin doesn't have a statute protecting information from self-audits or compliance reports a problem?" The speaker answered, "No."

The state's current regulatory climate is not overly punitive in nature, and never was. There is no evidence that businesses have been excessively penalized or prosecuted in Wisconsin. One of the stated goals of DNR's recent reorganization is a more conciliatory and cooperative approach to dealing with environmental violations. Even in the past, DNR has excelled at working with businesses to achieve compliance without prosecution. DNR deals

with thousands of regulated entities each year, and achieves through its stepped enforcement process compliance with all but the 100 or so referrals they send annually to DOJ. It is those 100 violators that are so recalcitrant, or so threatening to the human health and environment, that they must be punished. And none of them has been punished based on information voluntarily disclosed.

The alternative is often the much harsher punishment imposed by USEPA and USDOJ, as evidenced by the multi-year prison sentence handed down recently for a fellow who unlawfully dumped barrels of hazardous substances in various sites in northwestern Wisconsin. As USEPA loosens the reins on state management of environmental policy, it is a bad time for states to backslide on environmental protection by making enforcement a hostage of company-controlled evaluation. As we get more discretion, this law could backfire.

One goal the bill certainly serves is to insulate violators with increased litigation. Enforcement will become mired in motions to quash subpoenas, to suppress evidence, and to compel discovery, and in hearings to determine whether a document is an audit or whether disclosure was made promptly or whether appropriate steps were taken to correct violations, and to define the vague terms on which the bill turns. Examples follow.

The bill starts with providing immunity to violators of Wisconsin's environmental laws who disclose their violations, or at least some of them. No other area of law uses immunity to ensure compliance (and the tax laws, securities regulations, and worker safety laws are surely waiting in the wings).

Wisconsin certainly does not use immunity to help enforce the law. Rather, Wisconsin uses immunity to enable service providers and other "do-gooders" to do their jobs in areas where second-guessing could be costly: so Wisconsin provides immunity for safety inspectors, emergency care providers, ski patrol members, emergency response teams, foster parents, reporters of insurance fraud, food and equipment donors. Somehow, environmental violators do not fit in this list.

The immunity provided in this bill signals a sea change in the way Wisconsin laws work--instead of directly decriminalizing violations or eliminating violations altogether (and leaving environmental standards absolutely toothless), the sponsors of this bill would work an end run around existing environmental protection laws by tying the hands of those charged with enforcing them. The immunity proposed by this bill defrauds the citizens of this state.

The bill provides immunity for persons who promptly disclose information relating to a potential violation and make a good faith effort to timely correct the violation. How incidental to a violation must information be to be "related" to the violation? How soon is "promptly", and from when? May the person wait until the audit is completed, and how long can an audit be stretched out?

The bill makes a weak attempt to rein in repeat violators, but absolves businesses that stagger their compliance every 3 or more years: this year they'll audit and correct their excessive air emissions, in three years they'll audit and correct their hazardous waste dumping, and so on, all without any punishment and much to the chagrin of their law-abiding competitors.

More frequent repeat violators are not without protection from prosecution. What is the "pattern of continuous, repeated violations . . . in separate and distinct events" that pierces their immunity? Often we at DOJ drop out or combine counts or claims to bring the level of forfeitures more in line with a fair penalty relative to similar cases, the severity of the case at issue, and the cost of remediation or compliance. Must we now forego that exercise in fairness in order to establish the pattern prescribed by this bill? And if we include all those words ("pattern of continuous, repeated violations of environmental requirements in separate and distinct events related to a site or facility") in our judgments, will the defendants balk and force cases that would otherwise settle to trial?

Another exception to immunity is the existence of multiple settlement agreements within the previous three years relating to the violations disclosed. First of all, we at DOJ don't have settlement agreements--all our cases are resolved by orders and judgments entered in court. It is true that most of those orders and judgments incorporate stipulations. It is also true that we and DNR give most defendants time to meet the terms of those stipulations. Should we now insist on immediate compliance and payment of forfeitures, in order to be able to produce "multiple settlement agreements" to keep a violator from evading prosecution? Does this provision in the bill not even apply because our stipulated judgments are not settlement agreements, so that we will be forced to bring all cases to trial?

Another means by which violators can stagger their compliance with impunity, or rather immunity, is to audit only one process or activity at a time. The bill, by its definition of audit, discourages company-wide auditing, and encourages companies to correct one program at a time, while the rest of its operations may freely be in violation, and to disclose violations audit by audit, all the while reaping substantial economic benefit relative to law-abiding competitors. This is contrary to the integrated permitting that companies have found to be more cost effective and that regulatory agencies are finding more efficient, and to the level playing field that most businesses desire.

Repeat violators are not immune only if their previous violations "resulted in significant harm to public health or the environment." The problems here are many. First, most environmental laws were passed based on the cumulative effects of pollution--our air will turn poisonous if everyone emits too many toxics, and our waters will die if everyone puts too many wastes in them. This bill seems to suggest, however, that it's all right if

just one person exceeds the standards set for all--you'll never know because no one will die coughing or no fish will turn belly up from most individual violations. So, this bill subverts the very basis of our entire environmental regulatory scheme, by trivializing the conduct our laws restrict. Second, and relatedly, the bill excuses violations which have no immediate impact but result in environmental degradation over the long term.

Third, and most dangerous for Wisconsin citizens, the bill does not except from immunity current violations that themselves threaten the public health or environment. And, to add insult to injury, the bill protects information about such dangerous conduct under the cover of privilege.

The second part of the bill provides a privilege that keeps an audit secret and unusable by others. Like immunity, privilege has never been used as a compliance tool, and businesses might seek comparable protection for many other kinds of documents in this new approach to compliance. Wisconsin accords privilege only to those communications that are confidential under current societal norms: husband-wife, doctor-patient, lawyer-client, clergy-confessor. There is no similar basis for an environmental evaluation of a business to be confidential.

To the contrary, audit privilege is counter to the public right to know policies embodied in environmental and other laws, and is also counter to the open government that the Attorney General is committed to uphold and to the search for truth that undergirds our system of justice.

Privilege under criminal law is rarely given and reflects a weighing of values important to society; there has been no public clamoring for criminal offenders to tip the scales in the environmental arena. Moreover, because of the technical nature of environmental offenses and the complex management structures of many corporations, the elements of knowledge and intent cannot be proven without resort to the corporate records that could be encompassed by an audit. The hoops this bill requires a prosecutor to go through in order to bring a criminal action are unjustifiable, waste both the prosecutor's and the court's resources, facilitate the manipulation and destruction of evidence, and prevent quick response to threats to health and safety.

The privilege also adversely affects third-party rights. In Texas, the residents near a landfill have been denied access to environmental audits in an administrative challenge to the landfill's application for a permit to expand, and have alleged that the landfill has been able to use the audit privilege law to hide evidence of contamination from hazardous waste violations. In Ohio citizens have sued a company for failure to control toxic air emissions, and the company has used the audit privilege law to prevent those citizens from using corporate documents related to the emissions in court.

The public role so prominently preserved in so many of our environmental laws and our provisions for administrative and judicial review is cut at the knees by this bill. This audit privilege bill should be passed only if Wisconsin citizens want to keep such information as the evidence of the source of groundwater contaminants out of the hands of those suffering from cancer; there is no evidence that this is what the public wants.

The privilege provided by this bill will hide the information needed for the public to evaluate the efficacy of state environmental laws and the propriety of the effort to enforce them. Using privilege to keep non-confidential information secret will not build the voters' confidence that state environmental programs are doing the job of protecting their health and welfare.

Finally, the bill gags conscientious workers who feel compelled to tell the truth based on information from environmental audits. So much for self-policing.

In light of the documented reasonable approaches taken by DNR to compliance and by DOJ to enforcement, only a business with something to hide would benefit from a law that makes environmental audits secret and environmental violations penalty-free. As the constitutionally-mandated state prosecutor and enforcer of state laws and defender of state interests, the Attorney General cannot support a bill that so thoroughly undermines existing state environmental laws, so severely limits the exercise of discretion and judgment in the enforcement of those laws, and so arrogantly deprives the public of non-confidential information, as this bill does.

United States Attorney
District of Alaska at Anchorage

Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

Commercial: (907) 271-5071
Fax Number: (907) 271-3224

April 19, 1996

Representative Joe Green
Chairman, House Resources Committee
State of Alaska
State Capitol
Juneau, Alaska 99801-1182

Re: Senate Bill 199; An Act relating to environmental audits and health and safety audits to determine compliance with certain laws, permits, and regulations.

Dear Representative Green:

I am writing to express my serious concerns about legislation such as Senate Bill 199, which would establish an evidentiary privilege for environmental audits and create immunity for violators in certain circumstances. While I normally do not comment on pending state legislation, this legislation implicates significant federal interests. First, in Alaska as in most states, federal environmental laws are implemented largely through federally-approved state programs. By impairing a state's ability to enforce its own programs, this legislation would have the effect of impairing the enforcement of federal law. State privilege laws, some of which even include penalties against government officials who make disclosures of privileged information, would make it more difficult for the states to refer matters for federal enforcement. Second, defendants may attempt to raise state privileges in federal proceedings. While we believe these privileges would not apply, at a minimum, valuable resources would be wasted in litigation. Thus, there are strong reasons for federal law enforcement officials to be concerned about state legislation that would create a new evidentiary privilege or immunity.

I agree with Attorney General Reno's view that, properly implemented, environmental audits and other self-policing activities are useful tools of responsible businesses. Like the Attorney General, however, I am strongly opposed to legislation that would create a new privilege establishing a legal right to conceal from the public and from public officials a new class of secret information -- information relating to environmental

violations and to potential risks to public health and the environment. Equally radical would be the enactment of a new immunity law that would protect environmental violators from enforcement, and I share her opposition to new immunity provisions, as well.

The attorney-client privilege and work product doctrine already protect from disclosure certain materials that bear upon litigation, and courts and legislatures consistantly have rejected efforts to extend those protections beyond their well-established boundaries. There is no demonstrated need for a new and much broader evidentiary privilege for environmental audits. Available information indicates that, as a matter of good business practice, an increasing number of firms are performing audits without any audit privilege. Surveys also indicate that strong environmental enforcement has served as a major incantive for companies to self-audit, as well as to comply with the law.

An evidentiary privilege for audits would impede law enforcement by allowing facts that are important to the protection of public health and the environment to be hidden from public view and from government officials; thus, it would inhibit the operation of the very engine that drives audit efforts. Both compliance with the law and corporate accountability are more likely to occur within the context of openness than in secrecy. In addition, a privilege would inhibit and even prevent employees of businesses that violate the law from coming forward to report their employers' transgressions, thereby cutting off a very valuable source of information needed for the protection of the public.

Moreover, a privilege statute would mire enforcement efforts in a tangle of litigation over the applicability and reach of the privilege and the scope of exemptions. Critical terms in the statute are broad or ill-defined, and there are no established definitions or standards for environmental audits. This added litigation would consume scarce judicial, prosecutorial and investigative resources. Underlying health and environmental problems could be left uncorrected and the public unprotected during the resulting delays.

An environmental audit privilege also would be highly susceptible to abuse. Many of our criminal cases involve defendants who make false statements to government officials to conceal their environmental violations, and it would be an easy matter for these defendants to label ordinary internal

communications after-the-fact as "audits" or "self-evaluations" and assert false claims of privilege simply to delay an investigation. They could use the privilege even to shield continuing violations and ongoing criminal conduct. The public would be justifiably upset if the government were prevented from obtaining information about a violation that led to widespread damage or serious injury because of a claim of audit privilege.

The creation of immunity for those who under certain circumstances "voluntarily" disclose their violations to the government would be equally unwise, having the potential to allow serious environmental violators to escape responsibility for their wrongdoing when, after the fact and after the damage has been done, they come forward and disclose their actions. An immunity provision would have the perverse effect of actively discouraging proactive environmental management, since companies and individuals could immunize themselves retroactively even after causing serious harm simply by initiating action to correct problems only prospectively. This is unconscionable in an area of law designed to protect the health and safety of the public, especially where the violations at issue may have endangered the public or resulted in long-term environmental harm. It would place law-abiding companies at a competitive disadvantage and is unparalleled in any other enforcement context.

Finally, as a positive alternative to the proposed legislation, a number of policies and a wide range of programs have been developed and implemented at the federal level to encourage and promote voluntary environmental auditing and compliance, without the need for a deleterious audit privilege or the unnecessary granting of blanket immunity. For example, the United States Environmental Protection Agency recently adopted and published a broad and comprehensive new policy on incentives for self-policing (including environmental auditing) to address exactly the concerns that have driven the proposed legislation here. The Department endorses and supports that policy, which is consistent with existing policies within the Department that already require that prosecutors take into account self-auditing, self-evaluation and voluntary disclosure as important mitigating factors in the exercise of criminal prosecutorial discretion. The Department further supports the use of the EPA policy, in conjunction with other applicable policies, in the settlement of civil environmental enforcement actions.

Taken together, the policies of both EPA and the Justice Department contain the right mix of strong enforcement for

wrongdoers and leniency for good actors to ensure continued protection of the public and of the nation's environment. I would be happy to arrange for representatives from EPA and the Department to share with you ways in which these policies and programs could be adapted for use in this state.

With all of these points in mind, it is clear that legislation of the type proposed is both anti-environment and anti-law enforcement. Without a demonstrated need for its enactment, it would disrupt law enforcement efforts, prolong litigation, place an enormous burden upon public resources, conceal truth, frustrate efforts to protect public health and the environment, and provide violators with an unfair economic advantage over their law-abiding competitors.

Yours truly,

ROBERT C. BUNDY
United States Attorney

RCB:kjm

cc: Senator Loren Leman

Louisiana Environmental Action Network / LEAN

POST OFFICE BOX 66323 • BATON ROUGE, LOUISIANA 70896 • (504) 928-1315 • FAX (504) 922-9247

February 17, 1997

Ms. Carol Browner, Administrator
U. S. Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

By fax: (202) 260-0279 and mail

Dear Ms. Browner:

Please continue the EPA's policy regarding federal delegation of environmental programs in states that have enacted environmental self-audit programs!

The Louisiana Environmental Action Network/LEAN has already made two requests to the EPA and President Clinton to review the Louisiana Department of Environmental Quality's enforcement program. These requests have been strongly supported by Louisiana's environmental community. The fact that the Secretary of LDEQ has signed on to a letter with fourteen other state environmental department administrators which supports the idea that the federal agencies provide great deference to state authorities when evaluating the impact of state environmental audit programs, is not surprising, and makes our request even more urgent.

Self-audit legislation is a huge threat to the advances that have been made in our efforts to improve environmental conditions, and serves as a disincentive for self initiated improvement by industry. Even with the most forth right and willing participants, it dangles temptation and provides an opportunity to conceal negative information from the public. If these participants are already operating with questionable compliance records and are seeking opportunities to conceal their operations from the public, the implementation of self-audit legislation gives them a green light. At a time when the public is seeking broader and more in depth information about the toxics that they are being exposed to, industry is seeking ways keep the public from obtaining this vital information while providing themselves with immunity from enforcement through environmental self-audit legislation.

In Louisiana we are already questioning the enforcement practices of the agency that is supposed to represent the citizens' interests. With LDEQ's enforcement record, how can we expect a company to comply with environmental regulations if they know that there is no one enforcing the laws? Why should we expect the same companies who have wantonly degraded our environment and are showing little regard for present regulations to suddenly become conscientious citizens when given the opportunity to police themselves? Without EPA's leadership in assuring the public's right-to-know, what chance do citizen have to stand up and protect themselves?

The citizens of the United States deserve strong leadership from the EPA in opposing environmental self-audit legislation. They have the right to know that the regulations that have been put in place to protect them are being enforced, that there is access to information on the toxics that they are exposed to, and that those who are polluting our air, land and water can be held responsible for the damages. Not only do we ask that EPA oppose environmental self-audit legislation, but we ask EPA to remove any federal delegation of environmental programs from any state agency where such legislation has been passed.

Sincerely,

Marylee Orr
Executive Director
Louisiana Environmental Action Network

STATE OF MISSOURI Mel Carnahan, Governor • David A. Shorr, Director
DEPARTMENT OF NATURAL RESOURCES
OFFICE OF THE DIRECTOR
P.O. Box 176 Jefferson City, MO 65102-0176 (314)751-4422
FAX (314)751-7627

DEC 14 1995

Ms. Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

I am writing in support of the direction you and the U.S. Environmental Protection Agency are taking in issuing your policy on "Incentives for Self-Evaluation." This policy will encourage compliance with environmental laws by offering a process which companies and other regulated entities may affirmatively use. It should result in the reduction of potential penalties for entities that conduct audits or use other methods of discovering violations and promptly report and correct them.

At the same time, your new policy does not eliminate your ability to insure a "level playing field" for regulated entities who work hard to avoid violations of environmental laws in the first place. It should additionally protects the rights of citizens -- including their expectation that the compliance measures will be publicly available.

This policy will inevitably serve as an alternative to the kind of audit privilege proposals which have been made at both state and federal levels. The audit privileges include an avenue for environmental information to be held secret and unavailable for use in legal proceedings by private citizens as well as public agencies. Many also provide complete immunity for environmental violators under some circumstances. In Missouri, we chose to oppose legislation which would have such results.

Ms. Carol Browner
Page 2

You are to be congratulated on the extraordinary efforts which your agency made to receive input from the public, the states, regulated communities and public interest groups. We are particularly grateful for your inclusion of Missouri in this process. We feel that it provided a valuable forum to both provide input and receive information. We will use the experience we gained as we continue to develop our own incentives for environmental compliance and protection.

Very truly yours,

DEPARTMENT OF NATURAL RESOURCES

David A. Shorr
Director

DAS:mms

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
731 K Street, Third Floor • Sacramento, CA 95814 • (916) 443-2017

October 27, 1995

The Honorable Carlos J. Moorhead
U.S. House of Representatives
Washington, D.C. 20515-0527

Dear Mr. Moorhead:

On July 26, I wrote to you and other members of the California Congressional delegation expressing the California District Attorneys Association's strong opposition to attempts to limit the Environmental Protection Agency's authority to enforce criminal statutes in states that have enacted environmental audit privilege legislation. Our membership urges you to oppose any riders on the Appropriations Bill for Veterans Affairs, HUD, and Independent Agencies intended to limit EPA's authority in favor of audit privileges.

CDAA represents all 58 elected district attorneys and over 2,200 prosecutors in California. As an association that provides both training and legislative advocacy for California prosecutors, CDAA has taken great interest in legislation, both state and federal, affecting environmental enforcement. The CDAA board of directors has been a national leader opposing environmental audit privilege legislation, believing that there is no demonstrated need to take the radical step of creating a new privilege to protect criminal defendants. We believe there are other, less drastic means to promote environmental audits and give appropriate incentives and protections for those who do them. Attached to this letter is the CDAA Board of Directors resolution outlining our opposition to audit privileges.

As we stated in our earlier letter, California does not permit this privilege. CDAA worked against such legislation in the California legislature this year. We are currently working on language that will give more reasonable and limited protections for those who conduct audits without jeopardizing prosecutions against truly bad actors. If EPA is unable to bring enforcement actions in states, California will be at a significant disadvantage, being forced to compete with businesses that need not heed the same laws EPA enforces in this state.

We continue to believe that the riders to the VA-HUD-Independent Agencies appropriations bill will:

- permit criminally negligent operators to escape responsibility even when they cause serious harm to humans;
- deny communities and prosecutors access to information about the nature and extent of pollution in their community;
- severely handicap local, state and federal law enforcement officials;
- promote a non-uniform environmental regulatory environment across the nation by allowing states a loophole around federal environmental statutes; and
- benefit only companies with something to hide, since companies acting in good faith are protected under EPA's Interim Audits Policy.

Accordingly, California's prosecutors strongly urge you to reject any riders to the VA-HUD Appropriations Bill -- or any other legislation which promotes the creation of an environmental audit privilege. If you have any questions concerning this matter, please do not hesitate to contact me or CDAA Environmental Enforcement Director, Ed Lowry.

Very truly yours,

Gregory D. Totten
Executive Director

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CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

Adopted

October 13, 1994

CONCERNING ENVIRONMENTAL SELF AUDITS AND IMMUNITY

WHEREAS, the California District Attorneys Association is an organization composed of the elected District Attorneys of the California's fifty-eight counties and 3,000 deputy district attorneys and city prosecutors;

WHEREAS, California District Attorneys are the primary criminal enforcement officers in California; and

WHEREAS, criminal enforcement of environmental offenses became necessary since civil and regulatory enforcement has not sufficientiy deterred these offenses; and

WHEREAS, four states (Colorado, Indiana, Oregon, Kentucky) currently have self audit legislation that creates and immunity-type privilege for the information contained in a self audit; and

WHEREAS, the continued use of self audits coupled with any type of work product or immunity privilege, confuses the criminal prohibitory laws with the civil regulatory laws; and

WHEREAS, business offenders are able to pass the cost of civil and regulatory enforcement efforts on to the consumer as opposed to criminal enforcement which includes an alternative of incarceration for individuals, including corporate officers, that cannot be passed along; and

WHEREAS, deterrence of environmental offenses is of primary concern to the citizenry, including other law abiding businesses, who spend the time and money complying with environmental statutes and cannot compete with businesses operating in an unlawful manner; and

WHEREAS, environmental self audits coupled with any type of work product or immunity privilege are a flawed enforcement tool because they represent the self interests of a large corporation; and smaller companies and businesses usually do not have the resources to compile self audits and therefore find it difficult to compete in the market place; and

WHEREAS, allowing the use of self policing audits coupled with any type of work product or immunity privilege creates a type of "safe harbor" and helps entities insulate themselves from criminal prosecution; and

WHEREAS, there are not similar self policing type audits with privileges in any other area of the criminal law; and

WHEREAS, the environmental self audit is different from other self policing conduct (such as tax returns), in that there is a remedy available for other conduct (such as paying back taxes), but enforcement agencies cannot fully remediate the effects of most environmental offenses; and

WHEREAS, self evaluation audits prepared by an individual or company contain certain potential prosecutorial problems such as attorney work product doctrines, qualified immunity privileges and statutory immunity privileges; and

WHEREAS, the United State Environmental Protection Agency will be holding public hearings to determine its position concerning self audit legislation on a national level;

THEREFORE, BE IT RESOLVED THAT the California District Attorneys Association opposes any regulation or legislation involving environmental self audits which provides for privileges (statutory or common law), immunity or qualified immunity.

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March 18, 1997

Eric Schaeffer, Director
Office of Planning and Policy Analysis
U.S. Environmental Protection Agency
401 M Street, SW, MC: 2201A
Washington, DC 20460

Re: EPA Approach to State Environmental Audit Laws

Dear Mr. Schaeffer:

The purpose of this letter is to comment on the proposed Approach to State Environmental Audit Laws which was submitted to Administrator Carol Browner by environmental commissioners from a small number of states. While we respect the diverse views of different states, state legislatures and commissioners, we would join with many state attorneys general in opposing audit immunity and privilege statutes, and we therefore support the EPA in resisting this effort.

First, for good reason, evidentiary privileges are very limited in American jurisprudence. Privileges severely limit access to relevant and often very important evidence. Therefore, the need for a privilege should be unquestionably demonstrated before a new evidentiary privilege is created. The need for an audit privilege is at best highly questionable, and therefore should not be created. Other enterprises (i.e., banking, insurance) are entitled to no such privilege in connection with their auditing efforts. Moreover, many so-called auditing privilege statutes extend far beyond the contents of an independent audit report, but protect from disclosure all manner of information held by industry about environmental compliance of its operations.

Second, creating a class of secret information runs counter to the public disclosure requirements created in the environmental area over the last several years, such as community right to know laws. Creating an audit privilege which allows for the withholding of information from the public will only increase the public's suspicion about the activities and motives of industries discharging and emitting pollutants. As environmental litigation over the last 20 years has shown, the entities emitting and discharging pollutants into public resources possess the most persuasive, and often the only, evidence of alleged violations; creating a new class of secret information will further insulate polluters from public scrutiny and accountability.

Further, audit privilege legislation will increase litigation, rather than increase cooperation between regulated entities and state regulators. Even the most carefully crafted audit legislation often requires a judge, rather than the administrator of the environmental agency, to determine, first, whether information is subject to the privilege and, second, whether appropriate efforts have been pursued to correct noncompliance discovered by an environmental audit. Such legislation often also requires that the state have probable cause to believe that a crime has been committed before it is entitled to information contained in an environmental report. If information is claimed to be privileged, but is not, the State would have to litigate the issue before the Court would allow the State to even see no less use the information. In addition, there are no national standards, certification or licensing requirements for environmental auditors or audits. Thus, we believe it inevitable that considerable State resources would be expended in litigating the limits of what constitutes privileged environmental audits.

Audit immunity and privilege statutes, such as the one currently proposed in Maine, would also have the chilling effect of gagging State government and its employees concerning information suggested as having been derived from an environmental audit. In fact, the criminal penalties, established in the bill currently pending here, associated with disclosing information in an environmental audit, may be more severe than the penalties associated with the underlying environmental violation. In any event, the result of such penalties for the violation of a privilege statute would be enough to silence employees and create even more suspicion, rather than to foster openness.

Finally, and perhaps most importantly, we cannot see how a privilege statute resolves a concern that is based upon reality. We know of no one who contends that there is a history, here or elsewhere, of abusive prosecutions using information that a well-intentioned business discovered and immediately responded to in the course of a bona fide environmental audit. Most states and the EPA encourage such audits with policies that exercise prosecutorial discretion in favor of industries that make appropriate use of environmental auditing. These policies are fair, balanced, responsive to the issue and consistent with the public interest. By contrast, we believe environmental audit privilege statutes are a dangerous policy designed to address a problem that does not exist.

Thank you for this opportunity to comment.

Sincerely,

Jeffrey Pidot
Chief, Natural Resources Division

JP/tt

cc: Ned Sullivan, Commissioner, DEP
Jon Edwards, AAG

PREPARED STATEMENT OF BARRY R. MCBEE, CHAIRMAN, TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

I. INTRODUCTION

My name is Barry R. McBee and I am the Chairman of the Texas Natural Resource Conservation Commission ("TNRCC"). The TNRCC is a multi-media environmental agency covering all air, water, and waste-related activities. One of the TNRCC's guiding principles is *"To promote and foster voluntary compliance with environmental laws."* To further this goal, we pursue an effective and efficient compliance and enforcement program that maximizes voluntary compliance, ensures that potential polluters are informed of their environmental responsibilities and compels compliance through legal action when necessary. The TNRCC believes that strong traditional enforcement of environmental laws is necessary to guarantee that public health and the environment are protected. To improve the condition of our environment while our populace and economy thrive, we must have compliance with governmental requirements enacted by State and Federal legislatures.

This opportunity to provide testimony to the United States Senate Committee on Environment and Public Works regarding privilege and immunity provisions of environmental self-audit legislation and the differences between Federal and State approaches to these issues comes at a critical time for the future course of the State-Federal relationship. EPA Administrator Carol Browner has said that she views the relationship between the Federal and State environmental agencies much like a marriage. Based on my experience, EPA sees us in the light of a paternalistic parent-child relationship, a relationship that is not healthy and that we must both work to change.

In the 1970's State environmental agencies may have been immature, inexperienced and, dare I say it, "problem" children. But we are in the 1990's now, 30 years into the era of active governmental environmental protection. The States have matured and proven that they can and are willing to meet the *shared* goal of the Federal and State governments to protect the environment and public health.

It is time for Washington and the EPA to "cut the cord" and give States the independence and flexibility they need to meet each State's needs. States want, and deserve, as you heard a witness from the Department of Justice state in her testimony before your committee in June of this year, to be "partners" with the Federal Government, independent and responsible partners, with a greater role in the decisions that affect our States, our people, our environments and our livelihoods.

On May 23, 1995, Texas enacted the Environmental, Health, and Safety Audit Privilege Act (the "Audit Act"). This legislation provides limited immunity and privilege for the results of environmental self-audits. A law that promotes a spirit of cooperation between the regulator and those we regulate in achieving what we all want—clean air, clean water and safe land—is beneficial to all citizens of Texas. Providing entities an incentive to do their own self-analyses, to prevent pollution before it happens, and to promptly correct any problems they discover is a sound and reasonable approach. However, not everyone agrees with the fundamental basis of this law—even though 23 States to date have adopted laws encouraging this type of partnership. The practical reality is that the field of environmental regulation has evolved significantly over the past twenty years, moving consistently away, and rightfully and properly so, from the "gotcha" mentality toward the type of cooperation embodied in environmental self-audit laws.

Rather than embracing these innovative State approaches and providing Federal support, however, EPA has been a persistent antagonist. Delegation to Texas of Federal environmental programs has been threatened, and ultimately Texas was forced to compromise by amending its audit law to address some of EPA's concerns in order to get delegation back on track.

The Audit Act provides a limited privilege for certain information that is generated through a voluntary environmental audit and that is properly included in the audit report. It also provides immunity from administrative and civil penalties. Before its recent amendments, the Audit Act provided a limited immunity from penalties for a small subset of criminal violations, while specifically not extending the immunity to intentional and reckless conduct. It is important to highlight that the Audit Act never provided immunity from enforcement of environmental laws, but merely from the end product of that enforcement—the imposition of penalties. Problems or threats would be corrected through injunctive relief and similar tools. Among the conditions for penalty immunity is the requirement that the auditing entity must cooperate in the agency's investigation of the disclosed violations, and must initiate and complete corrective actions within a reasonable amount of time. Thus the Audit Act provides streamlined enforcement approach that fully addresses

violations that might never otherwise come to light. Normal agency enforcement efforts proceed at full force, unaffected by these additional disclosures.

There are essentially two underlying facts that make it eminently sensible for us to promote self-policing by regulated entities. First, the complexity of modern environmental regulation makes it extremely difficult for a regulated entity to be in compliance and to know whether it is fully in compliance. Second, the limitation on State enforcement resources found throughout the country, coupled with the immensity of the regulated community, makes it quite possible that, left to a traditional enforcement schedule, violations will go undetected and thus uncorrected. By providing a limited privilege and immunity for voluntary environmental audits, Texas is able to encourage self-evaluation and compliance while maintaining its diligent traditional enforcement efforts. Thus, the voluntary disclosures by entities that conduct audits and promptly correct violations to receive immunity from penalties enhances the results of our enforcement activities.

II. THE STATE-FEDERAL RELATIONSHIP UNDER STRAIN

State environmental agencies, not the EPA, conduct the vast majority of inspections to check for compliance with both Federal and State environmental laws and are primarily responsible for enforcement in most instances. Nine out of ten enforcement actions in this country are brought by State environmental agencies.

States have an adequate and talented pool of environmentally educated and trained engineers, technicians, lawyers and public policy experts. In fact, according to former EPA Administrator William Ruckelshaus, State environmental protection programs have grown to employ 54,000 men and women, versus 18,000 for the EPA. Where in the past States may have had to rely on EPA for human resources that were in short supply, States now have good, sophisticated and knowledgeable personnel.

As the Texas Legislature was analyzing its pending self-audit bill in 1995, the Clinton Administration declared that "the adversarial approach that has often characterized our environmental system precludes opportunities for creative solutions that a more collaborative system might encourage." President Clinton and Vice President Gore, *Reinventing Environmental Regulation*, Inside EPA Weekly Report: Special Report, March 16, 1995. The Texas Legislature approved the Audit Act in May 1995, believing that it had, in line with and supportive of the President's declaration, provided the regulated community with a tool to achieve and monitor compliance in cooperation with the TNRCC, so that they might be enabled to start thinking beyond compliance in just such a "collaborative system".

The EPA did not provide Texas with guidance regarding the potential impact of the Audit Act on the delegation of Federal environmental programs until well after the law was passed by the Texas Legislature. Oregon had passed the first environmental self-audit law in July 1993. However, EPA did not issue its guidance, "Statement of Principles: Effect of State Audit Immunity/Privilege Laws On Enforcement Authority for Federal Programs," until February 1997. Memorandum from Steven A. Herman, Asst. Administrator, EPA, *et al.* to EPA Regional Administrators (Feb. 18, 1997).

The first indication of the potential for Federal objection to the Audit Act came after the EPA raised issues related to the Idaho environmental self-audit statute in the context of Idaho's application for approval of Clean Air Act Title V delegation. A simple memorandum from EPA Headquarters to the EPA Region X Regional Counsel in April 1996 announced the beginning of the debate. Memorandum from Steven A. Herman and Mary Nichols, Asst. Administrators, EPA to Jackson Fox, EPA Regional Counsel, Region X (April 5, 1996) ("Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements"). This occurred almost one full year after the Texas law was enacted. Shortly after the April 1996 memorandum, EPA raised similar issues in the context of Texas' application for approval of its Title V program.

The debate escalated shortly thereafter as the Environmental Defense Fund of Texas (EDF) petitioned EPA to withdraw delegation to the State of Texas of the Underground Injection Control program, based in part on the opposition to environmental self-audit laws that EPA had expressed in the April 1996 Title V memorandum. The EDF petition is still pending.

The Texas Senate Natural Resources Committee held hearings in September 1996 on the implementation of the Act. It found that the majority of concerns about the Audit Act focused on the potential for withholding of delegation, not about lack of protection for our citizens. Texas Senate Natural Resources Committee, Interim Report to the 75th Legislature, *Effectiveness of the Environmental Audit Legislation* (Sept. 1996).

As Texas struggled for clear guidance from EPA regarding which specific provisions of the Audit Act EPA considered in conflict with regulations controlling delegation, some States, such as Utah, received specific recommendations from EPA on statutory changes that would pass EPA muster.

In November 1996, 15 State environmental commissioners officially requested a meeting with EPA Administrator Carol Browner to seek a way to cooperatively address this issue. The request went unanswered until Administrator Browner finally agreed to a meeting in early March of this year, shortly before the National Governors' Association was to meet in Washington. At that time, a coalition of more than ten States met with Administrator Browner and her staff and presented what was thought to be a reasonable compromise that the EPA would grant a 2-year evaluation period of State environmental self-audit laws to States whose attorney general had certified that the State had the necessary regulatory authority to carry out any new or existing program. Administrator Browner rejected the proposal outright, telling States "there would be no moratorium" and the only way to resolve differences would be for each State individually to enter into a "negotiation" with EPA officials in which they would be told what changes would be necessary for their State's law to be deemed acceptable by EPA for purposes of retaining or achieving delegated programs.

Shortly after that meeting, EPA Assistant Administrator for Enforcement and Compliance Assistance, Steve Herman and former EPA Region VI Regional Administrator Jane Saginaw, in a meeting with Governor George W. Bush, assured Texas that there were only a few changes needed to the Audit Act, that the negotiations would be quick, and that if successful, the Audit Act would no longer be a barrier to delegation. In that meeting the Governor made it abundantly clear, having been involved in similar negotiations with another Federal agency over welfare reform and State flexibility, an initiative that was derailed by the Clinton Administration, that he had grown tired of the State negotiating against itself. He made it clear that if we took steps in Texas to address this issue to EPA's satisfaction, he expected *no more issues* to be raised, for petitions challenging our existing program delegation to be dismissed, and for programs that we desire to have delegated to us to be delegated.

Texas came to the table with proposed revisions addressing the specific concerns EPA had voiced, such as removing the privilege from criminal proceedings, and which we agreed would improve our law. On the eve of the legislative filing deadline for the Texas Legislature in March 1997, high level negotiations between EPA and Texas officials resulted in a compromise being reached, and specific legislative changes were drafted. These changes were passed into law and became effective on September 1, 1997. Tex. Rev. Civ. Stat. Ann. art. 4447cc (Vernon's) (as amended by House Bill 3459, 75th Legislature).

Although these high level negotiations ultimately proved fruitful, a closer look at the delegation debate shows how the EPA has stretched the common and clear meaning of the words of its regulations to impose its philosophies and policies on the States. EPA's opposition to the Audit Act focused on the requirement in Federal delegation regulations that State civil penalties must be "appropriate" to the violation. *See, e.g.*, 40 C.F.R. § 145.13. EPA took the position that the State must consider certain criteria, the same criteria contained in EPA's Audit Policy, before arriving at "appropriate" penalties. For example, EPA maintains that a State must recoup the economic benefit of non-compliance as specified in EPA's environmental audit policy. This is a new interpretation of the Federal regulations and one that conflicts with EPA's expressed interpretation at the time it promulgated those regulations. EPA is in essence applying its own recently developed audit policy as a new minimum requirement for "appropriate" penalties under 40 C.F.R. § 145.13(c).

This approach has been described as blackmailing the States into adopting EPA's Federal policy on environmental auditing. Timothy A. Wilkins and Cynthia A.M. Stroman, Washington Legal Foundation, Working Paper Series No. 69, *Delegation Blackmail: EPA's Misguided War on State Audit Privilege Laws* (August 1996). At the very least, this approach is an improper form of informal rulemaking not intended by Congress.

EPA has also actively pursued its opposition to the Audit Act outside the delegation context. In December 1996 and January 1997, five Texas companies that had taken advantage of the Audit Act and voluntarily disclosed violations to the TNRCC were confronted with threatening EPA letters of inquiry regarding those same violations. These companies today remain under EPA investigation, although they have cooperated with TNRCC in addressing the disclosed violations. This interference by EPA in the Texas self-audit program was intentional and without warning to the State. Companies that had relied in good faith on the provisions of State law are

experiencing first hand the problems associated with a conflicting philosophy at the State and Federal level.

III. THE TEXAS AUDIT ACT

A. The Texas Audit Privilege

The Texas audit privilege attaches automatically to a report generated pursuant to a voluntary environmental audit. The scope of the privilege is broad and extends to all materials created in the course of an environmental self-evaluation and properly included in the audit report. However, there are three major caveats to this protection from discovery: (1) the privilege does not extend to any information required to be collected, developed, maintained, or reported under State or Federal law; (2) the privilege does not extend to any observation of the actual physical events of violations; and (3) the privilege may be overcome in an administrative, civil or criminal context where a tribunal determines that the privilege has been asserted for a fraudulent purpose or that appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence after discovery of the violation. Therefore, the Texas privilege is appropriately qualified and limited. A regulatory agency or a third party has potential access to the broad range of information that would normally be available without this legislation.

Whereas the privilege under the original Audit Act extended to criminal proceedings, the amended Audit Act provides for a privilege only in civil and administrative contexts. The original Audit Act included the safeguard that where there was evidence of criminal conduct, an audit report could be reviewed in camera.

EPA's fundamental objection to the audit privilege is difficult to reconcile with the privilege's potential to stretch Federal and State resources and to enlist the regulated community in a cooperative enforcement effort, a "creative solution" in a more "collaborative system", to again use President Clinton's words. It is interesting to note that the concept of a self-audit privilege is not foreign to the Federal Government. The Economic Growth and Regulatory Paperwork Reduction Act of 1996 amended the Equal Credit Opportunity Act and the Fair Housing Act to provide a limited privilege for information generated in a self-test conducted to determine compliance. This legislation recognizes the wisdom of enlisting the regulated community in the effort to achieve greater compliance. Where compliance is a matter that affects the public health and environment, the need to optimize cooperation is even greater.

B. The Texas Self-Disclosure Immunity

"Immunity" under the Texas Audit Act provides for relief from any punitive sanction, but not from all enforcement action—essentially it is a limited penalty mitigation. As a precondition to immunity, the disclosing entity must cooperate in the agency's investigation of the violation and must demonstrate correction of the violations within a reasonable time. When injunctive corrective provisions are deemed appropriate by the agency, a self-disclosed violation may be pursued through an enforcement order or civil proceeding.

As a further condition to immunity, a disclosing entity must provide to the agency a written disclosure as well as pre-audit notification, both of which are publicly available. Thus the immunity provision of Texas law competes in some measure with the privilege gained, and the public's right to information is protected. Furthermore, voluntarily disclosed violations must be recorded in an entity's compliance history maintained by the agency.

Despite EPA's opposition to the Texas Audit Act, the scope of the immunity provision has always been appropriately limited, particularly in the criminal context. Only a narrow range of criminal violations were eligible for immunity under the original law. Violations that resulted from reckless, intentional, or knowing conduct were never eligible for immunity. As a result of the compromise with the EPA, criminal violations are no longer eligible for immunity, without regard to their significance.

The Audit Act contains several additional limitations on the availability of immunity from penalties. For example, violations that result in substantial harm to persons, property, or the environment have always been ineligible for penalty immunity. As a result of the compromise with the EPA, immunity has been further restricted such that violations that result in risk of injury and violations that result in a significant economic benefit that results in an economic advantage are no longer eligible.

C. Texas' Experience

Texas now has almost 2½ years of very positive experience implementing the Audit Act. TNRCC enforcement (data demonstrate that despite the existence of

audit privilege legislation, TNRCC has maintained its rigorous enforcement standards. The audit privilege has shifted part of the burden to the regulated community to fund their own compliance rather than keeping it on the State to fund more inspections. As the following figures demonstrate, the TNRCC has maintained a strong inspection/enforcement presence to police the regulated community and to provide a disincentive to fraudulent misuse of the audit legislation.

	Fiscal year 1994	Fiscal year 1995 [1]	Fiscal year 1996	Fiscal year 1997
Total Inspections [2]	42,611	34,305	39,031	41,803
Notices of Violation Issued [3]	5,297	13,412	13,433	12,129
Formal Enforcement Actions Initiated	711	618	621	907
Orders Issued	346	795	666	664
Monetary Penalties Due	$5.03 million	$5.03 million	$6.87 million	$4.05 million
Audit Disclosures	NA	1	44	53

[1] The TNRCC Fiscal Year runs through August. The Audit Act was enacted May 23, 1995.

[2] Includes regularly scheduled facility inspections as well as complaint investigations.

[3] Fiscal year 1994 figure includes only notices of violation issued by the central office. The other figures include notices issued by TNRCC field offices.

Although the number of disclosures is not large relative to the number of traditional enforcement actions, it is a positive number, reflecting improved environmental conditions, improved compliance status, and heightened managerial environmental responsibility. And this number has been achieved despite the unnecessary cloud of uncertainty created by EPA's position regarding self-audit legislation.

As of this date, the TNRCC has received approximately 650 notifications of intent to conduct a voluntary environmental audit. Participants include: municipalities; universities; navigational districts; the United States Air Force; newspapers; filling stations; food and food products companies; barge and ship cleaning operations; the United States Department of Energy; paper and paper products manufacturers; automobile manufacturers; computer and computer parts manufacturers; electric utility services; cement manufacturers; metal manufacturers; waste disposal companies; petroleum refineries; petrochemical plants; and chemical manufacturers. These entities range from small businesses to billion dollar corporations.

A majority of the notices indicate that the audits will be multi-media covering all environmental regulations and permits. Therefore, through use of the environmental audit tool, multi-media evaluations, which are encouraged by EPA and the TNRCC; but which we have limited resources to conduct through inspections, are significantly enhanced.

Approximately 100 of these audits have resulted in voluntary disclosures of discovered violations. A total of 430 individual violations have been disclosed, and these either have been or are in the process of being diligently corrected. The majority of violations are air violations, ranging from record-keeping problems to exceedences that necessitate permit amendments or reevaluation of grandfathered exemptions. Several companies have reported inadequacies with air emissions inventories and toxic release inventories. Others have reported inadequacies with spill prevention and countermeasure containment plans, contingency plans, and personnel training programs. In one case a company reacted quickly to the discovery of falsified operating log entries by firing the responsible employee and retraining the other employees involved in data entry.

Simply put, many of these violations would not have been detected in a routine compliance inspection. Voluntary stack tests and other expensive sampling protocols which go above and beyond the regulatory requirements are the foundation for many of these disclosures. Erroneous log or other data entry problems are difficult to detect through any means other than a self-audit. In addition, a number of the audits investigated historical compliance for periods extending more than a decade. Although not hindered by a statute of limitations, the TNRCC and other Texas agencies would not normally review records of this vintage when conducting inspections.

All of these disclosures have occurred without disruption of the normal enforcement process. We have conducted our inspections as scheduled; brought enforcement actions where appropriate using required reports and our own information; and diligently scrutinized the regulated community as our statutes and delegation authority require. Yet, without regard for our real-life results and Texas' general enforcement record, EPA threatened withholding of delegation of Federal regulatory authority, claiming that the Texas Audit Act results in inadequate enforcement authority.

IV. CONCLUSION: THE NEED FOR FEDERAL LEGISLATION

The lack of Federal cooperation in the implementation of State self-audit laws has created needless tension and uncertainty that hampers State efforts to experiment with innovative enforcement tools and deters regulated entities from utilizing them. Federal legislation expressly allowing States authority to pursue such innovations would be a welcome development.

EPA's policy on environmental auditing states, "As always states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of Federal law do not threaten the public health or the environment, or make it profitable not to comply." 60 Fed. Reg. 66706, 66710 (Dec. 22, 1995). The Audit Act has always satisfied these conditions.

It appears that Federal legislation is necessary to restore the States' ability to pursue innovative enforcement that differs from EPA's preferred policies. United States Senate Bill 866 explicitly preserves the rights of the States to enact audit privilege and immunity laws and does not preempt State law in State actions brought under Federal laws for which the State has been delegated primary enforcement authority. Furthermore, S. 866 contains several admonitions to Federal agencies to preserve the intent of State audit laws.

Next week, EPA's Office of the Inspector General will be visiting the TNRCC to begin an investigation of our implementation of the Texas Audit Act. We hope the visit is used as an opportunity to understand the benefits Texas has derived from the use of this enforcement tool, to finally recognize its merits, and to prepare for implementation of the Federal environmental audit privilege and immunity legislation that we hope will be enacted during this congressional session.

PREPARED STATEMENT OF PATRICIA S. BANGERT, DIRECTOR OF LEGAL POLICY, ATTORNEY GENERAL'S OFFICE, STATE OF COLORADO

My name is Patricia Bangert. I am the Director of Legal Policy for the Attorney General's Office in Colorado. I am submitting this testimony on behalf of Gale Norton, the Attorney General of the State of Colorado. We appreciate the opportunity to address the important subject of State voluntary audit laws.

INTRODUCTION

We want to accomplish three things in this testimony. First, we want to clear up some misconceptions about our State voluntary audit law. Second, we want to tell you about some problems we've been having in fully implementing the law. Third, we want to urge you to take legislative action.

Colorado had one of the first voluntary audit laws in the country. Under the audit law, businesses, individuals, and other regulated entities may claim a privilege from disclosure in civil, administrative and criminal matters for voluntary self-evaluations if violations found in the evaluation are corrected. A "voluntary self-evaluation" is a self-initiated assessment, audit or review, not otherwise expressly required by law, performed for a company or person to determine whether the entity or individual is in compliance with environmental laws.

The Colorado law was also the first to grant a limited immunity from fines for disclosures of violations discovered in audits. Specifically, the law grants businesses, individuals, and other regulated entities immunity from fines for civil, administrative and negligent criminal violations when a violation is discovered in a self-audit and corrected. Colorado legislators were careful to craft exceptions to both privilege and immunity provisions so that the provisions could not be misused. I will explain some of those exceptions below.

MYTHS AND REALITIES

We think that our law is a positive step forward in protecting the environment of Colorado. Others, however, oppose our statute and the voluntary audit laws of other States. We think that much of this opposition is based upon some basic misunderstandings of the language and effects of the statutes. We want to mention here three basic misunderstandings and attempt to correct them. These myths and the realities are as follows:

1. *Myth:* The audit law allows companies to hide information from regulators. *Reality:* Audit laws do not in any way affect the ability of regulators to get information necessary to determine compliance with the laws. In fact, audit law encourages the creation of information and the undertaking of analyses that would not otherwise be available to a company or regulator.

The Colorado voluntary audit law applies to voluntary self-examinations. The statute does not allow companies to hide information that is required to be reported to regulatory agencies. The law does not allow companies to shield factual information necessary to determine compliance with the environmental regulations. Federal and State environmental regulators have no less authority to inspect and monitor facilities under the audit law than they did before its passage.

What the audit law does, in reality, is to encourage companies and other regulated entities to develop information that neither they nor the regulators had before the law was passed, specifically, to encourage companies to voluntarily examine their own environmental compliance and to correct any deficiencies. This is especially important for small businesses. Large companies can protect audits through the privilege accorded attorney-client communications. Small companies often cannot afford to hire attorneys, and, thus, need the ability to voluntarily evaluate their compliance with environmental laws without providing regulators a blueprint for enforcement action. This is accomplished in the audit law through the privilege provisions. The immunity provisions of the audit law encourage both large and small businesses to report violations discovered and work with the State Department of Public Health and Environment to correct them.

2. *Myth:* The audit law would result in greater environmental degradation by allowing companies to commit violations of the environmental laws and then hide the violations. *Reality:* The audit law represents a positive environmental gain because it results in violations being discovered and corrected, violations that probably would not have been found absent an audit.

The Colorado audit law applies only if violations discovered in a voluntary self-audit are corrected. The privilege does not apply if a company finds a violation and that violation is not corrected. In addition, immunity will not be granted if the violation reported is not corrected. In short, there is a positive environmental gain from the voluntary audit law. Self-examinations that would not otherwise be done are being done; violations that would not have been discovered are being discovered and corrected.

3. *Myth:* The audit laws away the authority of regulators to prevent harm to the public and the environment. *Reality:* Regulators have ample authority under the audit law to prevent abuses or harm to the public and to the environment.

A court or administrative law judge can order the disclosure of an audit if any person can show: (1) that the person or entity seeking the privilege is not acting to correct violations found in the audit; (2) that compelling circumstances require the audit to be disclosed; (3) that the privilege is being asserted for a fraudulent purpose or that the audit was done to prevent disclosure in an ongoing or imminent investigation; or (4) that information in the audit shows a clear, present and impending danger to the public health or environment outside of the facility. Further, the privilege from disclosure granted in the audit law does not apply to any information or documents required to be maintained, reported or available to regulators under any law or regulation; information acquired independently by regulators; or documents prepared before or after the audit.

In addition, disclosure immunity may not be granted for violations not corrected, or for disclosures required to be made under an entity's permit; or to entities with a history of violations. Finally and most important, disclosure immunity goes only to fines for civil, administrative and negligent criminal penalties. The regulators retain full authority to issue compliance orders, to get injunctive relief, to secure any remedy other than fines, and to prosecute criminally those who blatantly violate the environmental laws.

THE COLORADO EXPERIENCE

From the passage of the Colorado audit law to this date, 25 entities have made 28 disclosures and requests for immunity under the law. (Some companies made more than one disclosure and request for immunity.) The Department of Public Health and Environment granted 17 of these requests in whole, 1 request in part, and denied 5 requests. Five requests are still pending. The violations involved the following programs: water (5 disclosures), air (15 disclosures), and waste (8 disclosures).

Of the disclosures made, many have led to actions that will provide long-term environmental benefits and will enhance compliance. These benefits include: conducting staff training in environmental procedures; modifying company practices that result in violations; and discontinuing certain emissions entirely. In addition, disclosures were received from at least nine companies or emission sources that were not known to the State's regulators because they were operating without certain permits, and were not likely to have been discovered independently by State inspectors.

These self-identified companies are now "in the system" and their compliance can be tracked by regulators. In fact, many of the violations reported would not have been found by regulators under the State's present regulatory scheme, or by company officials, absent a self-evaluation.

Colorado's voluntary audit law, then, has resulted in positive environmental gains. More could be done, however. There are thousands of permitted facilities in Colorado. Twenty-eight voluntary disclosures constitute a very low percentage of regulated entities. We believe that more persons and entities would utilize the provisions of the audit law if not for independent action and threats of action by the Environmental Protection Agency against companies utilizing the audit laws.

EPA INTERFERENCE AND THE POTENTIALLY FAILED EXPERIMENT

Another aspect many people fail to understand about the Colorado voluntary audit law is that it is an experiment. Many years ago, Justice Holmes described the States as the "laboratories for democracy." The audit laws are perfect examples of States experimenting with a concept that may potentially result in significant environmental gains. The "command and control" method of environmental regulation has proven to be less than totally effective in promoting compliance with environmental laws. For one thing, we simply do not have the resources to do all the inspections and monitoring that would be needed to get 100-percent compliance. Everyone now agrees that something more is needed to encourage companies to voluntarily look at their own compliance and correct deficiencies. Many States are experimenting with audit laws to determine whether those laws may be part of that "something more."

Colorado's voluntary audit law applies only to audits, and, thus, to disclosures arising from those audits performed before June 30, 1999. Our lawmakers gave the audit experiment five years to prove itself or fail. Because of interference by a Federal agency, that experiment may never be fully completed. Specifically, the Environmental Protection Agency appears to be doing its best to ensure the failure of the audit experiment.

We would point to two principal ways in which EPA is thwarting State initiatives in the voluntary audit area:

1. Requiring States to change their audit laws by utilizing the power to revoke State delegations under the environmental statutes; and

2. Threatening or taking actions against companies who utilize audit laws under the Agency authority to overfile and request information.

The Environmental Protection Agency has made no secret of its dislike for State audit laws. We have no doubt that the Agency truly believes that its position on those laws is the correct one. The problem this presents for the States, however, is that the Agency is utilizing its various authorities under the environmental laws to compel States to change their audit statutes and to discourage companies from utilizing those laws.

First, EPA has successfully intimidated several States into amending their audit laws. As you know, EPA has the authority to delegate, and the authority to revoke delegations of authority to carry out many of the environmental laws to the States. For several years, EPA has threatened to revoke delegations under the Clean Water Act, the Clean Air Act and RCRA in States with audit laws.

Of late, the Agency has embarked upon a course of negotiating individually with States to address issues with delegated programs. The results of the negotiations, not surprisingly, have been that the States are required to change their laws so that their provisions are satisfactory to the Federal agency. Also not surprisingly, the new State statutes look very much like EPA's own audit policy. For example, in Texas, the EPA required the State, among other changes, to eliminate the application of immunity and privilege provisions to criminal actions and to eliminate immunity where a violation results in a serious threat to health or the environment or where the violator has obtained a substantial economic benefit from the violation. What is left in the Texas statute—a privilege in civil actions and immunity from the gravity component of civil and administrative fines—looks very much like the EPA Final Policy on Environmental Audits. In short, EPA has embarked upon a campaign to make State audit policy's mirror images of its own. It is truly a sad state of affairs when a Federal agency can dictate the contents of legislation to a sovereign state.

Several months ago, EPA began negotiations with Colorado State officials regarding our audit law. The Agency required negotiations after receiving a petition from a citizen group requesting the Agency to revoke the State's delegation under the Clean Water Act. Those negotiations are ongoing and we would be happy to keep you informed about their progress.

The second way in which EPA is thwarting State initiatives in the audit area is by discouraging companies from utilizing audit laws. The Agency has successfully done this by taking actions, or threatening action, which appears to retaliate against companies that do not use the provisions of the audit law. These actions include overfilings and burdensome requests for information. Our experience in Colorado has been that EPA has dramatically increased actual and threatened overfilings. From October 1995 through September 1996, EPA overfiled in only two cases in the entire United States. In the first 4 months of this year, EPA overfiled in three cases in Colorado alone and has threatened to overfile in at least 10 more. In each instance in which EPA has overfiled, violations were corrected and there was no continuing harm to the public or the environment. The EPA brought its case solely because it disagreed as a policy matter with the amount assessed in fines by the State against the violator. Following are the companies against which EPA overfiled and the fines sought by the State and by EPA:

Company	State Fine	EPA Fine
Denver Radiation	$160,000	$466,000
Conoco	33,000	666,771
Platte Chemical	400,000	1,200,000

In addition, EPA has specifically threatened to overfile against three entities regarding disclosures made under Colorado's audit law: the Denver Water Board, Total Petroleum, and Western Mobile. Perhaps as a prelude to an overfile, the Agency has burdensome requests for information to at least one of these entities.

The Denver Water Board, a quasi-governmental entity supplying water to Denver residents, voluntarily audited its environmental compliance in 1995. During the course of that audit, it found several violations of the Colorado Water Quality Control Act and hazardous waste requirements for small quantity generators. Immediately following its discovery of the violations, the Water Board began to take corrective action. All violations were corrected to the satisfaction of the State Department of Public Health and Environment and the Board requested immunity from fines. That request is presently under consideration by the Health Department. In all probability, none of the violations discovered in the Board's audit would have been found by regulators or the Board absent the voluntary self-evaluation.

The EPA rewarded the Water Board for its initiative by requesting hundreds of pages of documents from the Board regarding the violations. Nothing can be more intimidating to companies wanting to use the audit law than the EPA actions.

Under the State's audit law, information disclosed by a business or person seeking immunity from fines becomes public upon disclosure. This information may then become a blueprint for enforcement actions by EPA if it wishes to overfile or seek further information. Potential Federal action, then, discourages the use of the audit law. In fact, I have personally spoken to several attorneys representing Colorado companies and they have indicated that they would not advise their clients to utilize the audit law because of the threat of Federal action. These companies—specifically those large enough to hire experienced environmental counsel—will simply protect audits under attorney-client privilege.

What is lost under the present state of the laws is the means and incentive for small companies to do audits and for all companies to voluntarily disclose and correct violations. This brings us to the subject of Federal legislation.

THE NEED FOR FEDERAL LEGISLATION

We believe that some type of Federal legislation is required in order to fully carry out the audit experiment. As you know, there have been numerous bills introduced in the past several sessions of Congress, ranging from a Federal audit privilege and disclosure immunity bill to legislation simply prohibiting Federal action against an entity utilizing a State disclosure immunity provision. We do not comment here on which type of bill might be preferable. Because of the real and perceived threat of Federal action against companies and persons utilizing audit laws, we would urge you to consider at least some legislation protecting entities who disclose violations to State regulators.

The Department of Justice and EPA have argued that EPA's Final Policy Statement on Environmental Audits is sufficient to provide businesses and individuals with the protection they need under Federal law. But EPA's policy is just that—a policy that can be changed at will, and on a case-by-case basis, by the Agency. The Final Statement says:

> The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any parties.

In light of that disclaimer, the promises contained in the Policy do not carry a lot of weight. The EPA Policy, then, is insufficient to provide the type of protection that is needed to make the State audit experiment successful. Unfortunately, the EPA will not voluntarily stop its aggressive war on State audit programs. Federal legislative action, then, is needed to bring about a cease-fire.

IN CONCLUSION

On behalf of Gale Norton and myself, we again thank you for this opportunity to testify regarding State audit laws. We would be happy to offer any help that we can provide in securing legislative solutions to the problems outlined here.

PREPARED STATEMENT OF PAUL G. WALLACH, ESQ., SENIOR PARTNER, HALE AND DORR, LLP; ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS (NAM) AND THE CORPORATE ENVIRONMENTAL ENFORCEMENT COUNSEL (CEEC)

Mr. Chairman and members of the Committee, my name is Paul Wallach. I have practiced environmental law for some 20 years and am a senior partner in the Washington, DC, office of the law firm of Hale and Dorr, LLP. I have prepared a longer written statement and respectfully request that it be entered into the record.

I am here today on behalf of the National Association of Manufacturers (NAM) and the Corporate Environmental Enforcement Council, Inc. (CEEC). NAM is the Nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every State and produce about 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector and more than 18 million employees.

CEEC is an organization of 22 diverse major companies with a strong commitment to the environment and environmental compliance programs. CEEC is comprised of senior environmental managers and corporate counsel from a wide range of industrial sectors. It focuses exclusively on civil and criminal environmental enforcement public policy issues, and the overall need to ensure that environmental enforcement serves the goal of environmental protection. I have also brought with me a copy of CEEC's recently issued Platform for Effective Environmental Compliance and Enforcement which includes a review of the importance of and the need to eliminate obstacles to auditing, and respectfully request that it also be entered into the record on behalf of CEEC.

NAM and CEEC appreciate the opportunity to testify today. Both organizations have carefully considered the issues relating to auditing and voluntary disclosure. Without question, the failure to have in place adequate and certain protections for voluntary audits has created strong disincentives and obstacles to auditing. In the face of these obstacles many regulated entities have chosen to audit, but the current lack of protection for these audits has a very real chilling effect, which often limits the utility, intensity and scope of audits that are undertaken. These obstacles impede our ability to achieve the overriding goals set by Congress in enacting our environmental laws—the protection of human health and the environment.

Those environmental goals will not be realized, however, unless the environmental regulatory system is structured to promote voluntary compliance. Members of the regulated community must be able to fully implement voluntary programs to candidly assess, prevent, detect, and correct violations of a regulatory requirement, as well as situations which have the potential to threaten the environment or public health and safety. Yet, the system in place creates obstacles and disincentives for such programs, and for auditing in particular. Thus, we believe that properly-crafted Federal legislation is long overdue and urgently needed. It is about moving into the future, or as some may say the bridge into the 21st century of environmental protection.

Mr. Chairman, let me pose the policy issue another way. A manufacturer, university, governmental entity, hospital, or any other responsible regulated entity that aggressively audits—as well as their management and environmental personnel—should not be placing themselves in a position of greater potential liability than those who do not. Yet, that is exactly what is happening today under our current system. Documents and information developed through voluntary self-evaluations can be and are used against regulated entities in a variety of contexts, including enforcement actions, citizen suits or third-party tort actions. The concerns are

heightened by the massive potential civil penalties and the very real possibility of criminal convictions of regulated entities and individuals for inadvertent conduct. Indeed, overcriminalization of our environmental laws in a fashion not intended by Congress presents substantial policy issues which we believe Congress should separately consider.

Over the past decade we have witnessed tremendously proactive and environmentally positive actions by the regulated community, including the development and use of sophisticated voluntary environmental auditing programs and compliance management systems. This has resulted in substantially higher rates of compliance and improved environmental performance. In a bipartisan fashion Congress itself recognized the "substantial benefits" of voluntary auditing, for example, when it strongly encouraged the practice in the Conference Report for the Clean Air Act Amendments in 1990. Yet, because of the extraordinary potential liabilities, many regulated entities remain reluctant to proceed with aggressive auditing programs, and those who do take steps to protect themselves—ranging from not putting specific findings in writing, to utilizing the attorney-client privilege—which greatly reduce the utility and benefits of audits that are undertaken.

NAM and CEEC support Federal legislation because they see a very important opportunity for the environment. We are here today with the hope that this opportunity is not lost in a cloud of rhetoric and skepticism. The regulated community wants to *voluntarily* audit their facilities, correct noncompliance and improve their operations. However, it is not fair, much less good policy, to expose those who do so to enhanced potential liability. Thus, it is important to consider carefully and parse the rhetoric of those who oppose even thoughtfully crafted legislation. Perhaps most puzzling is the position of EPA. Although the Agency has repeatedly emphasized that it "*never*" seeks to obtain audit reports, it claims that the failure to allow it to obtain these reports will create secrecy and impede its ability to enforce the environmental laws. EPA cannot have it both ways.

And upon analysis, it can be seen that the "parade of horribles" that opponents of Federal legislation have identified cannot be substantiated, unless one exaggerates both the nature and scope of responsible Federal audit legislation. There would *not* be "blanket immunity." Nor would intentionally "bad actors" receive *any* protections for criminal violations. Nor will environmental protection suffer. To the contrary, aggressive auditing will uncover previously unknown deficiencies which must then be quickly corrected. Nor would an audit law result in secrecy. Much of the underlying information contained in an audit is available elsewhere in the broad range of information that is required to be collected and disclosed under environmental laws. Information that would otherwise not have been known would be made routinely available as a result of the disclosure requirements.

Looked at from another perspective, EPA should be asked how legitimate a case is if the Agency can only pursue it because a regulated entity voluntarily reported a violation and promptly corrected it. What purpose does enforcement serve in that situation? Isn't the public policy issue of compliance better served by encouraging self-assessment and timely correction than by gratuitous enforcement? And, more importantly, isn't the environment better served by encouraging early detection of problems and immediate correction?

In a resounding recognition of the many benefits, 23 States have enacted legislation offering qualified protections for audit reports and/or voluntary disclosures, or both. Oregon enacted the first such statute in 1993. Rhode Island enacted its law in 1997.

While EPA has also repeatedly recognized the benefits of and need to remove obstacles to auditing and voluntary disclosure, it has to date not been willing to support the legislative actions at the Federal or State level necessary to do so. In fact, the Agency has vigorously opposed Federal legislation and brought extreme pressure to bear on those States that have adopted or considered it—by threatening withdrawal of delegated programs, as well as by extraordinary scrutiny of regulated entities that have utilized State laws. This EPA conduct is especially troubling because it so directly impedes the ability of these State laws to achieve their goals *and* because EPA has not pointed to an actual case where the legislation inhibited State enforcement in any fashion.

EPA did issue a Policy in December 1995, entitled "Incentives for Self-Policing; Discovery, Disclosure, Correction and Prevention of Violation" ("Policy"). EPA should be commended for this very positive step. The Policy, however, is only a long overdue penalty mitigation policy for voluntary disclosures. It does *not* eliminate the various disincentives and obstacles to auditing and voluntary disclosure that we previously discussed. Indeed, even if the Policy were perfect, EPA simply does not have the authority to eliminate the key obstacles and disincentives to auditing. Rather, only Congress has that power, and, thus, there is a need for Federal legislation.

I. AUDITING IS CRITICAL TO THE ACHIEVEMENT OF THE NEXT LEVEL OF ENVIRONMENTAL PROTECTION

In recent years the use of environmental audits has grown both in terms of comprehensiveness and sophistication. Although there are many different types of "environmental audits," EPA has defined environmental auditing as the systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements.

Both EPA and the regulated community have long recognized that environmental auditing leads to significantly higher levels of overall compliance, improved environmental performance and reduced risk to human health and the environment.[1] Auditing can also be used to review a company's environmental management structure and resources. By way of example, audits often are used to:

- Assess and reduce environmental health and safety risks, both as required by regulation and on a voluntary basis that goes beyond compliance.
- Anticipate upcoming regulatory requirements (which enables facilities to manage pollution control in a proactive manner).
- Prioritize pollution prevention activities.
- Help management understand new regulatory requirements and establish corporate policies.
- Assess internal management and control systems.
- Measure progress toward compliance.
- Improve expeditious communication regarding environmental developments to facility personnel and, where appropriate, ensure effective communication with government agencies and the public.
- Assure that capable and properly trained personnel are available at all times to perform emergency and other environmental functions.
- Evaluate causes for environmental incidents and determine procedures to avoid recurrence.
- Assure sufficient budgeting for environmental concerns.
- Provide a means for employee training and performance evaluation.
- Maximize resources through recycling, waste minimization, and other pollution prevention measures, including process changes, that may benefit the environment.
- Fulfill various other obligations, such as providing appropriate disclosure to other agencies (*e.g.*, the SEC), and evaluating the environmental aspects of corporate or real property transactions.

Industry and other members of the regulated community have been extremely progressive with respect to auditing and the establishment of environmental programs. Many commentators have predicted that the next generation of environmental compliance will rely on regulatory self-evaluation systems—day-to-day management systems that include audits—which will lead to enhanced compliance and improved environmental performance. We believe that voluntary Environmental Management Systems (EMS) are important for all entities because they establish a systematic mechanism to analyze environmental impacts of operations, set goals for improvement, monitor activities and make adjustments for continued improvement. EMS also provide for integration of environmental concerns into the daily business operations.

Environmental audits themselves are becoming more sophisticated. Audits have also been increasingly affected by the needs of multinational corporations and the desire for consistency among the environmental standards of different countries. Auditing techniques are constantly improving as well and are increasingly being included as part of value-added business programs. Companies are also utilizing "environmental life-cycle audits" to determine the totality of impact that products and services may have on the environment.

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[1] Although Congress has not yet protected environmental audits in legislation, it considered such protection in the context of the Clean Air Amendments of 1990. The Statement of Managers contained the following language:

Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter, refrain from using information obtained by a person in the course of a voluntarily initiated environmental audit against such person to prove the knowledge element of a violation of this Act if—(1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused to be corrected such violation as quickly as possible; and (3) in the case of a violation that presented an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment. 136 Cong. Rec. S16951 (Oct. 27, 1990).

II. THE TENSION BETWEEN AUDITING AND FEDERAL ENFORCEMENT IS GROWING

In recent years, we have witnessed an unfortunate and unintended, but very real, tension between enhanced auditing and other innovative environmental management programs and the significantly enhanced potential liability for regulated entities and individuals under our environmental laws. Today, the vast majority of regulated entities are managing themselves in an environmentally responsible manner, with only a handful operating "outside the system." Yet, given the unparalleled complexity and lack of clarity of the unique multi-statute environmental scheme and the myriad applicable regulations, 100-percent compliance is extremely difficult, if not impossible. The complexity, lack of clarity and vastness of the regulatory scheme cries out for aggressive auditing and the resulting candid discussions and self-critical analysis within a regulated entity by the very individuals responsible for environmental compliance. However, the very real potential that such auditing can lead to enhanced liability in specific situations has limited its use.

The primary concern with conducting an audit is the enhanced liability threat. Federal and State enforcement officials, citizens' groups, and third-party litigants (including plaintiffs in toxic tort actions) may seek, in the course of litigation, to discover environmental audits as a means of finding a road map for every environmental concern the company may have had and may then misuse the information to create claims against the company. Even this threat has a substantial chilling effect. It has led to a reluctance to aggressively audit by many members of the regulated community—particularly small businesses. For others, we have seen extreme caution in the scope of audits that are undertaken, frequent use of attorney-client privilege to protect audits, the writing of non-specific reports and a variety of other practices that greatly reduce the value of audits to a company and, more importantly, the benefit to the environment.

I have seen companies using caution repeatedly in my practice, and it has been consistently underscored by the many representatives of the regulated community who spoke to EPA during the Audit Policy dialogue. It was also confirmed by Price-Waterhouse in a survey—"The Voluntary Environmental Audit Survey of U.S. Business," 28 (March 1995). According to Price Waterhouse, 75 percent of the corporate respondents had some sort of environmental auditing program. Yet, the survey also indicated that "there is still a perceived reluctance to expand audit programs, in the face of possible enforcement." Price Waterhouse noted that "when these companies were asked what factors detract from their willingness to expand their environmental auditing program, more than 45 percent of the respondents stated that information could be used against them in citizen's suits, toxic tort litigation, civil enforcement actions or as a road map to establish knowledge in a criminal enforcement action." In addition, nearly two-thirds of the companies that perform environmental audits stated that they would expand their programs if penalties were eliminated for problems that the companies themselves identified, reported, and corrected.

The Price Waterhouse survey also indicated that 81 percent of the companies that audit try to protect their audits from disclosure pursuant to some sort of privilege, usually the attorney-client privilege. This necessarily increases the cost and complexity of audits, making them less useful, and often undermining what could have been a truly constructive effort. It also means that the specific information obtained by auditing, as well as the attendant learning, is not making their way through the company, especially to the facility personnel who have the greatest need for the information, because widespread dissemination is not consistent with the attorney-client privilege.

III. THE STATES SHOULD BE COMMENDED, NOT CRITICIZED, FOR TAKING THE INITIATIVE

Following careful review of the significant environmental benefits to be gained from auditing and voluntary disclosure, and with an understanding of the disincentives and obstacles, various States moved to enact legislation protective of audit reports or disclosures, or both. Oregon enacted the first audit protection statute in 1993. Since then, 22 other States have enacted legislation, including Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming. Even in the face of EPA pressure, other State legislatures are or are expected soon to be considering similar legislation. As you have heard from other witnesses today, to the extent EPA has allowed them to function, these laws have had a strong and positive impact. But these State laws obviously do not reduce the need for action at the Federal level, as only Federal legislation can:

- provide a qualified privilege under Federal law;

• provide limited protections under Federal law for environmental violations disclosed to EPA and expeditiously corrected; and
• prevent voluntarily disclosed information from being used as a road map for litigation against the disclosing entity in governmental enforcement actions, citizen suits, or toxic tort litigation.

NAM and CEEC have been and remain extremely concerned about EPA's continued critical and threatening position with respect to Federal enforcement and the delegation of Federal programs in those States whose legislatures have made the decision to foster environmental protection and improve compliance by enacting legislation that provides qualified protection for audits and/or voluntary disclosures. NAM and CEEC do not believe that EPA should be overriding State laws in this fashion, nor should EPA be compelling States into revoking or severely changing their audit laws (or intimidating regulated entities that chose to utilize these laws). Congress intended that the States take the lead and be responsible for implementing most of our environmental laws, and in doing so simply wanted to ensure that the States had adequate authority to take enforcement actions which they believed were appropriate. Congress did not—as EPA suggests—restrict the States by requiring them to impose a penalty every time a violation occurs. Nor did Congress intend for EPA to use its program approval authority to coerce State legislatures if they deviated at all from EPA's preferred approach.

Stated another way, the States are capable of enforcing environmental laws and applying legal accountability and compliance assurance in their policies and actions. The States have demonstrated their commitment to environmental compliance and enforcement and their innovative legislative programs must be allowed to go forward.

IV. EPA'S POLICY IS A STEP IN THE RIGHT DIRECTION, BUT IS NOT SUFFICIENT

"The Policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party." Office of Enforcement and Compliance Assurance.

Over the past several years, CEEC has worked closely with senior personnel from the Office of Enforcement and Compliance Assurance (OECA) on a number of key enforcement policy issues. We have appreciated the openness of senior officials in OECA, and especially Assistant Administrator Steve Herman, and the dialogue that we have developed on enforcement policies and issues. CEEC and NAM also recognize and appreciate the willingness of EPA to consider new and creative approaches to environmental compliance and enforcement, through its Policy,[2] as well by other activities such as OECA's ongoing evaluation of its performance measures.

At the same time, NAM and CEEC have believed for several years that Federal audit protection and voluntary disclosure legislation is necessary because EPA's Policy cannot, by definition and as a result of limitations on the Agency's authority, eliminate all of the obstacles to self-policing. For example, EPA's policy cannot impact prosecutions by the Department of Justice or other Federal agencies, citizen

[2] We note that other Federal agencies and departments have voluntary disclosure and amnesty programs. For instance, the FAA's voluntary disclosure policy was instituted in 1990 after the agency realized that "air carriers and [others] could do more to monitor their own regulatory compliance." In implementing the policy, FAA officials emphasized that "because the air carriers have far greater resources than the FAA and because the issue of air safety is of paramount importance * * * they should have in place a procedure whereby internal compliance audits are performed." The policy was designed to provide incentives for deficiencies to be identified and corrected by the companies themselves, rather than risk air safety by awaiting the results of an FAA inspection. FAA officials also emphasized that:

> the enforcement program is not an end, but is rather a means to achieve compliance with the Federal Aviation Regulations * * * the FAA believes that aviation safety is best served by incentives * * * to identify and correct their own instances of noncompliance and invest more resources in efforts to preclude recurrence, rather than paying penalties.

Federal Aviation Administration, Compliance and Enforcement Bulletin No. 90–6, March 29, 1990. In addition, the U.S. Occupational Safety and Health Administration ("OSHA") first announced its Voluntary Protection Programs ("VPP") in 1982. This program allowed businesses with exemplary worker protection programs to enjoy a special regulatory relationship with the agency. The most advanced of the VPPs, the Star Program is available to companies that meet certain criteria, which establish management systems for preventing or controlling hazards, and which have a demonstrated history of compliance. In exchange for the company assuming primary responsibility for compliance monitoring at its facility, OSHA agrees to remove it from OSHA enforcement inspection lists and offer priority in variance requests and technical compliance assistance.

suits, toxic tort actions or State prosecutions. Stated another way, the EPA Policy is not a substitute for Federal legislation.

During the dialogue on the Policy, many in the regulated community discussed with EPA why the failure to have in place *adequate* and *certain* protections for audit reports and voluntary disclosures created obstacles to environmental auditing and had a strong chilling effect which severely reduced the utility of audits that are undertaken. They emphasized that a responsible regulated entity that audits should not be in a position of greater liability than an entity that does not audit. Nor should its management or environmental personnel be put at greater risk.

In issuing the Policy (60 Fed. Reg. 66706, December 22, 1995), EPA reiterated that voluntary auditing and disclosure (*i.e.*, self-policing) by the regulated community were—especially with EPA's limited resources—critical to achieving environmental protection goals. Although it is still in need of revision, we commend EPA for improving and clarifying the availability of penalty mitigation for responsible entities. Yet, the penalty mitigation of the Policy falls short of the environmental protections EPA could have achieved through the adoption of a broader policy. For example:

- A regulated entity that uncovers through auditing and promptly discloses and corrects a violation and satisfies all of the criteria set forth in the policy still faces potentially severe penalties.
- The Policy does not apply to individuals, who are left entirely unprotected and as a result will not be encouraged to aggressively identify environmental issues.
- The Policy provides EPA with substantial discretion as to whether the various applicable prerequisites are satisfied, thereby failing to provide the certainty necessary to promote candid, self-critical analyses.
- The Policy does not protect information provided to EPA from disclosure to other government agencies or third-parties, nor does it adopt an alternative approach that would allow such a disclosure but provide limited protection to those who disclose.

The limited nature of the Policy, coupled with its exclusive focus on penalty mitigation, only underscores the need for comprehensive Federal and State legislation if we are to achieve the environmental benefits that EPA seeks.

V. WHY FEDERAL LEGISLATION IS IMPORTANT

As discussed above, an EPA policy is not an adequate substitute for Federal legislation. Similarly, the protections offered by the States that have adopted audit laws are not enough. Moreover, in light of EPA's ongoing campaign against these laws, there is an increasing need for Federal legislation to clarify the rights and roles of States in developing audit laws without EPA's undue interference, in addition to establishing a Federal law that goes beyond the necessarily limited protections State laws offer.

We are not suggesting that Federal legislation should take away the States' rights to develop their own programs. However, Congress needs to build on the States' programs—as it has in so many other areas where the States are the initial proving grounds—to further Federal policy. Thus, Federal legislation should ensure that State programs are allowed to develop.

It should also be noted that the elements of the legislation we support are neither novel nor without precedent. For example, as part of the budget package passed last year, Congress amended the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA) to provide for a privilege for information developed in audits conducted to determine compliance with the ECOA and FHA. *See* 15 U.S.C. § 1691c and 42 U.S.C. 3614 note. The *Federal law* governing skilled nursing facilities clearly prohibits a State or the Federal Government from requiring disclosure of the records of a quality assessment, which every nursing home receiving Medicare or Medicare funds is required to establish. *See* 42 U.S.C. § 1396r(b)(1)(B). In addition, protections have long been provided for certain disclosures pursuant to the Comprehensive Emergency Response, Compensation and Liability Act (42 U.S.C. § 104(e)(7)(E)) and the Clean Water Act (33 U.S.C. § 1318(b)).

VI. RESPONDING TO CRITICS OF FEDERAL LEGISLATION

NAM and CEEC recognize that Federal legislation needs to be carefully crafted, and that it should include safeguards to preclude abuse of its limited protections. Critics of Federal legislation have consistently made a series of generalized charges to support their concerns about the legislation. These charges—while perhaps creating attractive sound bites—are unsupported, and take aim at hypothesized dangers and imaginary legislation that does not provide the safeguards that responsible members of the regulated community so strongly support. These charges include:

1. Federal legislation would amount to "blanket immunity."

Proposed Federal legislation has not provided for "blanket" immunity. But it has proposed to provide environmentally responsible entities with a qualified protection if the entity establishes that the violation was promptly corrected and disclosed to the appropriate governmental agency, and the entity provided all further relevant information requested by the agency. In addition there is no qualified immunity for repeated violations.

2. The legislation would protect "bad actors" and promotes "secrecy."

"Bad actors" who intentionally violate environmental laws do not typically take the time to conduct voluntary self-audits, much less undertake the costly steps required to comply with environmental requirements in a timely fashion. In any event, it was never the intention of any Federal legislation to protect willful and intentional violators, and the pending bills do not do that. Nor will that legislation in any way restrict EPA' s (or the public's) ability to obtain the broad array of documents, data and other information that is currently available. To the contrary, following enactment of self-disclosure legislation, EPA and the public will have more information, as much of the information identified by an environmental audit may be disclosed pursuant to one or more of the many disclosure requirements that are at the heart of our environmental regulatory system. A list of many of those reporting requirements is attached to this statement.

3. Environmental protection will suffer as a result of the legislation.

No basis for this assertion has been seriously suggested, and once again the opposite is true. The limited protections offered by the legislation do not affect the government's ability to issue an order or obtain any injunctive relief necessary to protect public health or the environment. Moreover, effective environmental auditing typically is more probing and thorough than a regulatory compliance inspection, and therefore is more likely to uncover deficiencies or instances of environmental noncompliance than a government inspection. In order to benefit from the voluntary disclosure component of proposed Federal legislation, an entity must act quickly to correct any non-compliance. For this reason too, increased environmental auditing will result in increased compliance with environmental requirements, and ultimately improved environmental protection.

In addition, we believe that environmental protection will be enhanced as the regulators will be provided with more extensive information about regulatory compliance. As regulators are presented with this increased information about how the regulations do and do not work in the real world, they will be able to improve upon existing regulations.

4. The legislation will not impact the behavior of regulated entities.

We do not believe that this is correct. Audit protection/voluntary disclosure legislation will remove obstacles to the voluntary self-auditing process in several ways. First, entities *and* individuals that already perform voluntary environmental audits will be able to do so more candidly and thoroughly and thereby auditing will be more useful. Second, more entities and individuals will be encouraged to perform voluntary environmental audits, and to do so aggressively. Third, more companies and individuals will go beyond compliance, undertaking evaluations that are not required.

5. The legislation protects factual information about environmental violations from regulators.

This argument ignores the very narrow scope and qualified nature of the protections. Protection is *not* extended to any of the information that is required to be collected under environmental laws. Stated another way, the qualified privilege does *not* cover routine sampling or monitoring data or information obtained from an independent source. Nor does it restrict the government's ability to use its broad authority to investigate and obtain information related to the underlying facts.

Moreover, as noted previously, such qualified protection will encourage and increase the free flow of information, enhancing the information available to the government and the public. Absent protection for audit reports and related disclosures, information will not be internally communicated as openly, nor will it all be available for release. Indeed, neither regulated entities nor individuals will not have the incentive to aggressively seek to uncover additional information in the first place, much less disclose it.

6. Federal legislation would impede the government's ability to bring environmental enforcement actions.

Because enforcement officials will continue to have access to all of the information that regulated entities are required to maintain and disclose and because EPA retains its full inspection and information gathering authorities, qualified audit protection will *not* have any effect on the ability of EPA or any regulatory agency to establish nonconformance with a regulatory requirement. Enforcement officials will continue to be able to inspect, sample and monitor an entity's compliance under existing environmental laws, and entities will still be required to comply with all existing recordkeeping and reporting requirements.

CONCLUSION

Removing the obstacles and providing the proper types of incentives and protections for voluntarily conducted environmental audits and related disclosures will only serve environmental goals. Administrator Browner to her credit often cites the need to use a "Common Sense" approach to development of effective environmental policy. Providing incentives and qualified protections for those in the regulated community that are good citizens and are doing the "right thing" by trying to find, report and fix any actual or potential environmental problem is "Common Sense." Mr. Chairman, NAM and CEEC look forward to working with Congress in a bipartisan fashion so Federal audit legislation that is good for the environment can be enacted.

EXAMPLES OF REPORTING OBLIGATIONS TO FEDERAL AND STATE REGULATORY AGENCIES

Clean Water Act

Permit Applications
Spill Plans
Discharge Monitoring Reports
Excursion and Release Reports

Resource Conservation and Recovery Act (and State Analogs)

Permits (Part A & B)
Manifests
Quarterly, Annual and Biennial Reports
Exception Reports
Closure Plans
Emergency & Spill Plans
Underground Storage Tank Registration Release Reports

Clean Air Act

Permits
Release Reports
Monitoring Reports
Excursion Reports
Annual Compliance Certification
SIP-Specific Reporting
NSPS Reports

Emergency Planning and Community Right To Know

LEPC/SERC
Material Safety Data Sheet
Emergency and Hazardous Chemical Inventory Forms
Annual Toxic Chemical Release Forms
Release Reports
Superfund Site Plans
Facility Reports

Toxic Substances Control Act

Registration and Notices for Manufacturing, Processing and Importation of Chemical Substances
Submission of Test Data and Health and Safety Studies
Chemical Information Reporting Requirements
Reporting of Information Relating to Chemicals Posing Substantial Risks

Safe Drinking Water Act

Certification Reports
Under Ground Injection Permits
Under Ground Injection Reports

Federal Insecticide, Fungicide, & Rodenticide Act

Registration Reports
Compliance Reports

Occupational Health and Safety Act

OSHA 200 Logs
MSDS
Incident Reports

Securities Requirements

10K Environmental Disclosures
10Q Environmental Disclosures

State-Specific Reporting Requirements (Examples)

Massachusetts Toxic Use Reduction Act Reporting
New Jersey Industrial Site Recovery Act Reporting
California Proposition 65 Reporting

CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, INC.

CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL PLATFORM FOR EFFECTIVE ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

The Corporate Environmental Enforcement Council ("CEEC") is an organization of diverse major companies with facilities throughout the United States and across the globe. Member companies share a strong commitment to the environment. They are supportive of aggressively set environmental goals consonant with a modern economy. Our members also support proactive, contemporary environmental stewardship dedicated to effective environmental protection *and* prudent use of resources. We believe such stewardship encompasses a number of elements beyond the traditional compliance/enforcement approach, including compliance education, promotion of voluntary actions beyond compliance, and a recognition of the importance of the competitive market place for driving environmental stewardship.

At the same time, CEEC recognizes the need for a strong environmental compliance program and a strong enforcement program that identifies and penalizes significant violators who have not availed themselves of compliance options, as well as those who willfully and intentionally violate our environmental laws. Unfortunately, in many respects, the current compliance and enforcement programs are neither properly balanced nor focused.

When the environmental laws were first being implemented in the 1970's, not everyone moved quickly to adopt their operations and practices to the new environmental requirements, even those for which compliance was not difficult. At that juncture, well-publicized enforcement was often beneficial, sending the message to the regulated community that compliance with the new environmental legal structure was mandatory.

Now, however, the vast majority of the regulated community has demonstrated its strong commitment to operating within the regulatory structure. Compliance is the rule, not the exception. The tremendous improvement in the attitude of the regulated community with respect to environmental protection and compliance practices has been widely recognized.

EPA's and DOJ's approach to environmental compliance and enforcement needs to more fully evolve to keep up with these changes. As we have found better ways to achieve our environmental goals, CEEC believes that a new construct for environmental compliance and enforcement is long overdue—one that reflects the current compliance realities; that ensures that sufficient and proper resources are devoted to environmental compliance; and, that, while a strong enforcement presence is maintained, enforcement actions are properly directed. We also believe that innovative solutions should be recognized and rewarded and that science, technology and collective goal-setting should be the tools used to improve environmental performance. To that end, CEEC has adopted the following set of principles for an effective environmental compliance and enforcement program:

CEEC PRINCIPLES

• The States should be the primary focus for implementation and enforcement of environmental programs.

• While maintaining a strong and focused enforcement program, Agency efforts and resources should primarily be devoted to compliance.

• Environmental compliance and enforcement efforts must be directed at achieving desired environmental goals.
• Environmental enforcement should be prioritized at all levels based on the seriousness and the nature of the violation.
• Prosecution of environmental criminal violations should be based on intentional violations of clearly enunciated standards that are interpreted and applied in a consistent manner.
• Self-assessment, as well as a qualified immunity where appropriate for voluntary disclosures, should be encouraged as the most effective way of achieving our environmental goals.
• *The States should be the primary focus for implementation and enforcement of environmental programs.*

As an initial matter, CEEC believes it is time for an immediate and substantive change in the roles of the various government regulatory agencies.

EPA's Role: EPA should focus on the implementation of environmental statutes, in particular on the achievement of environmental goals, and not on the specific method to achieve the goals. With regard to compliance, EPA's policies should focus on the actual performance result that is wanted and the environmental performance metrics that will be used to judge the success of compliance with those goals. EPA should then coordinate and ensure that its policies are uniformly understood by the States, thereby providing a national baseline as to what environmental result is desired. Enforcement should become principally a State function, with EPA maintaining a strong presence and the ability to step in if a particular State has demonstrably failed to enforce the environmental laws. EPA should not reflexively consider a drop in enforcement cases as a sign of failure or a signal that there is something wrong with a State program. Rather, EPA needs to acknowledge that an increase in compliance rates is compatible and should necessarily result in a downward turn in enforcement.

The Role of the Regions: As EPA's relationship with the States changes, the role of the EPA regional offices would also need to be reexamined. In particular, we believe that the regional offices are best suited to providing compliance and technical assistance. In essence, the offices should act as technical consultants to States on how to best achieve environmental performance results. Any regional policymaking role should be returned to EPA Headquarters. All unused resources in the Regions should be transferred to the States to bolster the manpower of the agencies who are actually implementing and operating the environmental programs. Finally, the Regions should assist EPA Headquarters in policing overall State efforts.

The States' Role: The States would then have the primary responsibility for the implementation of the operating programs and the resulting enforcement programs. The States would have to commit not only to implementing the programs, but also to actual environmental results, which results would be consistent across the country. In this way, CEEC believes that States would be the better arbiters and implementers of how to achieve the national environmental goals.

DOJ's Role: Finally, DOJ's role, too, needs to be reevaluated. The application and implementation of all of CEEC's Principles for Effective Environmental Compliance and Enforcement apply to both EPA and DOJ, in their respective roles. However, with regard to DOJ's role in particular, CEEC believes that DOJ's resources need to be redirected to working with EPA to pursue those regulated entities clearly operating outside the system. In addition, DOJ's focus with respect to environmental crimes should be on those criminal cases that reflect intentional and willful conduct.

While maintaining a strong and focused enforcement program, Agency efforts and resources should primarily be devoted to compliance

Environmental laws and regulations continue to expand in number and complexity at a rate which exceeds most other regulatory areas. Agency interpretations of these rules are often difficult to ascertain and may vary over the years and throughout EPA's regions. Moreover, implementation of environmental laws through thousands of pages of regulations and variable "guidance," interpretations, and "policy statements" makes 100-percent compliance impossible all of the time. EPA needs to recognize this and work with the regulated community to help achieve the highest possible level of compliance and better protection of the environment.

In a mature regulatory program, continually increasing enforcement suggests that there is something wrong with the system. Enforcement should be a tool that is employed only when a regulated entity is not working to come into compliance. EPA and the regulated community should be proud of the increased compliance rates and take credit for their respective roles in achieving them. However, EPA needs to work on increasing compliance and technical assistance to all regulated entities, not just small businesses. By way of example, CEEC believes that an expansion of the

Small Business Assistance Policy that was put into place in 1996 would maximize environmental benefits for all.

Environmental compliance and enforcement efforts must be directed at achieving the desired environmental goals

As an initial matter, CEEC believes that environmental protection must be the overriding goal of all environmental regulation and environmental programs. Likewise, the compliance expectations of agencies should be tailored to the achievement of that goal and to allow the necessary flexibility to achieve it. Thus, CEEC believes that ultimately environmental regulations should be recast to focus on the goal of environmental protection, instead of the current focus on the process or method to achieve that goal. However, until that time, we must work incrementally to change the enforcement policies and procedures that have evolved as a result of an overemphasis on enforcement.

One method of refocusing EPA's current compliance and enforcement program would be to adjust the goals and measures of the program to assure that EPA does not reward the pursuit of enforcement for enforcement's sake, but instead encourages systematic and creative compliance with environmental laws in ways that achieve the greatest environmental benefit. Individual noncompliance problems are less important to society than achieving the goals of lessened pollution, lessened exposures and lessened ecological impacts. Thus, the success of a compliance program should be measured incrementally by the number of noncompliance problems that an organization detects, corrects and reports to a government agency. Alternatively, a measurement of the success of a compliance program could focus on the numbers of training and outreach person-hours, the extent of private self-auditing, and the measurable ambient environmental improvements, such as stream water oxygen levels.

Companies also routinely provide incentives and measure employee activity for the completion of the more difficult environmental compliance tasks. Likewise, CEEC believes EPA should measure its success by the ways in which it encourages its employees to properly value and take credit for compliance-oriented activities, to pursue the truly difficult or serious enforcement cases, and not simply to go after the easy inadvertent violations.

Environmental enforcement should be prioritized at all levels based on the seriousness and nature of the violation

CEEC members support an effective environmental enforcement program aimed at identifying and punishing those who lack the commitment to comply, as well as those who willfully and intentionally violate environmental laws. At the same time, CEEC believes an enforcement-first mind-set is counterproductive. EPA and DOJ enforcement must recognize a distinction between the truly serious and non-serious violation in terms of whether an enforcement action should be pursued at all.

Enforcement, whether civil or criminal, should be seen as a last resort to be used when regulated entities do not make good faith efforts and fail to manage and control environmental issues. EPA's enforcement goal should be to take no enforcement actions for minor "outages" or "mistakes," in light of outstanding corporate performance. Playing "gotcha" by finding technical violations at a facility is not productive; enforcement should focus on violations that actually harm the environment.

EPA and DOJ need to make clear distinctions in terms of the seriousness of the compliance lapse and its impact on ambient environmental conditions. This is especially true in the multimedia enforcement context, where a handful of minor violations can be packaged into a major enforcement action. EPA should explain the process by which decisions are made to take enforcement actions, and ensure that the criteria are consistent with overall environmental goals. While a company's responsible actions may be taken into account in the penalty phase (or in the sentencing context in a criminal case), the drive for enforcement for enforcement's sake often effectively precludes consideration of those factors as part of the decision to pursue a case.

At a minimum, EPA's screening methodology should ensure that enforcement is not the first resort in gray areas: such as where a regulation is ambiguous, or a member of the regulated community did not have fair notice of the interpretation that EPA is seeking to enforce. Unfortunately, punitive enforcement measures have been taken where the regulations are unclear or where an unpublished agency interpretation is inconsistent with the meaning of the regulation. These kinds of enforcement actions have diverted significant compliance and production resources and negatively impacted our ability to achieve statutory environmental goals.

Prosecution of environmental criminal violations should be based on clearly enunciated standards that are interpreted and applied in a consistent manner

Despite the ever-improving performance of the regulated community, there has been an increasing overcriminalization of environmental statutes, as civil cases have been elevated to criminal ones and misdemeanor cases to felonies. Discovery and prosecution of criminal activities is in general a laudable goal; however, CEEC believes the severity of the actions being punished should be commensurate with the punishment itself. Thus, there should be a clear distinction between a civil and a criminal environmental violation. Criminal enforcement should only be used in egregious cases where there is a knowing or willful intent to violate, such as midnight dumping, intentional or long-term noncompliance with a permit or standard, or falsification of records.

CEEC believes that there must be a bright-line standard concerning the actions or mental state that transforms a civil regulatory violation into an object of criminal investigation and prosecution—that is, the use of a specific intent standard. If specific intent is not a required element of a crime, well-intentioned but misguided or uninformed persons can be subject to felony sanctions. Application of the specific intent standard for the initiation of a criminal environmental case would not diminish the effectiveness of the government's enforcement efforts. Criminal penalties would be reserved for those recalcitrant individuals and organizations who flout their environmental obligations, while EPA's broad civil enforcement powers would be applied to those individuals and organizations who made other than acceptable good-faith efforts to comply.

Additionally, the severity of the penalty for an environmental crime should be closely related to the culpability of the violator, and mitigating factors (especially compliance programs) should result in meaningful penalty reduction. CEEC believes that the penalty setting mechanism of the Federal Sentencing Guidelines, Chapter 8—"Sentencing of Organizations" should be expanded to include environmental crimes, should recognize and accommodate the wide variability of environmental crimes, and should take into account that small businesses have fewer compliance resources. Finally, the sentencing guidelines should reflect the strong societal interest in encouraging regulated entities to protect the environment—and encourage, not punish, self-policing and self-correction of environmental deficiencies.

Self-assessment, as well as a qualified immunity where appropriate for voluntary disclosures, should be encouraged as the most effective way of achieving our environmental goals

CEEC believes that most of the regulated community is committed to environmental compliance. One way the regulated community has already demonstrated its commitment is through self-auditing and detection and correction of mistakes early on. CEEC believes that self-auditing must be encouraged and obstacles removed, so that entities are able to ensure that they are complying to the fullest extent without enhancing their potential liability.

Moreover, CEEC believes that corporate environmental programs could be even more successful absent the unintended chilling effects of the current enforcement program. Instead of being commended for voluntarily collecting more data and attempting to put it to good use, many regulated entities have watched their own data—which they voluntarily collected and analyzed to identify problems and improve performance—put to use against them in enforcement proceedings. Any enforcement program must be structured so that those entities who move forward with these innovative activities—and the individuals who implement them—do not expose themselves to more liability than those that take no action.

Thus, CEEC supports a three-pronged approach. First, there is a need for legislative action to encourage self-auditing and self-correcting by providing a qualified immunity that protects the self-auditing volunteer from unfair prosecution or civil suits based on the results, so long as there are good faith efforts to correct the problems found and the corrected problems are reported promptly. Second, as EPA does not have the resources to inspect every facility, or pursue endless enforcement actions, CEEC believes EPA should encourage the self-policing efforts by the regulated community, and count with pride the guidance and technical assistance it provides that allows members of the regulated community to correct and/or avoid compliance issues. Third, CEEC believes that the States should be encouraged to experiment with legislation and/or other flexible methods to provide incentives for self-auditing and self-correction programs that produce positive compliance efforts among the regulated community.

Corporate Environmental Enforcement Council, Inc.

What Is It?

CEEC is an organization comprised of corporate counsel and management from a wide range of industrial sectors that focuses exclusively on civil and criminal environmental enforcement public policy issues.

What Does It Do?

- Provides a forum for the review and discussion of current enforcement issues and the development of constructive recommendations on civil and criminal environmental enforcement policies. CEEC to date has addressed: appropriate protection for audits and related disclosures; federal and state audit legislation, federal sentencing guidelines; permit certifications; enforcement language in specific legislative proposals; development of alternative measures of enforcement success; supplemental environmental projects; federal overfiling; the overcriminalization of environmental laws; enforcement implications of ISO 14000; and other enforcement initiatives.
- Is a sophisticated, cross-industry organization providing comments and serving as a resource to the Administration and Congress;
- Focuses exclusively on enforcement provisions of environmental legislation;
- Provides an opportunity for corporate counsel and management to share experiences and information on programs, policies, and trends, relating to environmental compliance and enforcement;
- Serves as a vehicle for the review of precedent setting environmental enforcement administrative and judicial actions; and
- Serves as a resource to state and local groups as well as numerous trade associations on federal and state environmental enforcement issues.

Members:

Ashland Inc., The BFGoodrich Company, Caterpillar, Inc., Coors Brewing Company, DuPont, Elf Atochem, North America, Inc., Eli Lilly and Company, First Brands Corporation, Georgia-Pacific Corporation, Hoechst Celanese Corporation, ITT Industries, Kaiser Aluminum & Chemical Corporation, Kohler Company, Lockheed Martin Corporation, Lucent Technologies, Owens Corning, Pfizer, Inc., Polaroid Corporation, Procter and Gamble, Textron, Westinghouse Electric Corporation, and Weyerhaeuser Company.

For More Information:

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THE
NEW ENGLAND
COUNCIL

November 20, 1997

The Honorable John H. Chafee
United States Senate
567 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Chafee:

I am writing to express the appreciation of the New England Council for your interest and consideration of federal audit legislation. For New England companies that are ahead of the curve regarding environmental management, this legislation would provide incentives to conduct comprehensive self audits. We believe the establishment of voluntary audit and disclosure will be good for the environment and good for business.

At your recent hearing of the Environment and Public Works Committee, Paul G. Wallach, a longtime member of the New England Council Board of Directors and Chairman of the Environment Committee testified on the importance of this issue. Although Mr. Wallach did not represent the Council specifically, he did mention that we had adopted a policy in support of federal legislation consistent with maintaining our strong environmental commitment as New Englanders. I would like to request that this statement by the New England Council be added to the official October 30th hearing record.

Thank your for your continued support of the Council. I look forward to hearing from you in the future.

Sincerely,

James T. Brett
President & CEO

Enclosure

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THE NEW ENGLAND COUNCIL

The New England Council
Policy on Federal Audit/Disclosure Legislation

The New England Council is the nation's oldest business organization. It's members include the Region's leading manufacturers, financial and academic institutions, public utilities and high-technology firms. The Council works closely with the region's thirty-five member congressional delegation to effectively promote the interests of the Region.

Members of the New England Council strongly support federal legislation that would provide qualified protection for voluntary environmental self-audits conducted by regulated entities, as well a limited protection for those who disclose self-audit information to the government. Consistent with environmental protection goals regulated entities should not be discouraged from systematically reviewing their compliance status, environmental programs and environmental management systems.

Unfortunately, the current legal system has inadvertently created obstacles to such reviews and has led various regulated entities to limit the scope of their auditing programs and to minimize the internal dissemination of audit information. This is because regulated entities that voluntarily audit often find themselves exposed to greater potential liability -- in terms of government enforcement, penalties and private litigation -- than regulated entities that do not audit.

The New England Council supports federal legislation that would prevent voluntary self-audits from being used against a regulated entity as evidence in any proceeding, with the exception of a criminal proceeding where the government has shown intentional and willful criminal conduct. In addition, the Council also supports federal legislation that would provide limited protection from government sanctions for organizations and individuals who voluntarily disclose noncompliance discovered in a self-audit, or as a result of their environmental management system, *and* promptly seek to correct the violations identified. However, there should not be any immunity whatsoever if there is a knowing and intentional violation of an environmental requirement.

The United States Environmental Protection Agency and the regulated community agree that voluntary environmental self-auditing has led to significant improvement in environmental performance and overall compliance with environmental laws and regulations. Building upon the successful programs in states across the country that individually have enacted this type of legislation, Federal legislation will nationally remove the obstacles to, and provide incentives for, self-auditing and voluntary disclosure. The New England Council supports this approach and believes that it will greatly further the ability to achieve the environmental goals that are of special importance to our Region.

PREPARED STATEMENT OF MARK WOODALL, CHAIR, SIERRA CLUB, GEORGIA CHAPTER

I. INTRODUCTION

Mr. Chairman and members of the committee, thank you for allowing me to make a statement on behalf of the 550,000 members of the Sierra Club. My name is Mark Woodall and I serve as the volunteer chair of the Georgia Chapter's Legislative Committee and as chair of the Sierra Club's Audit Privilege Task Force. I'm a commercial tree farmer by occupation. I am also co-submitting this testimony on behalf of the U.S. Public Interest Research Group (U.S. PIRG).

The Sierra Club and U.S. PIRG, as organizations that have brought numerous citizen enforcement actions under our national environmental laws, are committed to preserving the legal tools ordinary citizens have fought for and need to protect themselves from harmful pollution practices in their communities. That is why Sierra Club and U.S. PIRG bitterly oppose the creation of any secrecy privileges or immunity rights for entities undertaking environmental self-audits, at either the State or Federal level. In particular, we strongly oppose S. 866, as well as any bill that would restrict the U.S. Environmental Protection Agency's (U.S. EPA's) ability to administer its delegated programs in States with audit privilege and immunity laws.

II. S. 866 HURTS OUR RIGHT TO KNOW AND UNDERCUTS ENFORCEMENT

The creation of a Federal audit privilege is a radical measure that would create a vast dumping ground for corporate polluter's dirty secrets. Allowing polluters to withhold vitally important information on pollution practices that effect the health and property rights of their neighbors, and letting environmental law breakers escape accountability for serious, chronic, and even criminal violations is bad policy: it would undermine the public's right to know, tie the hands of law enforcement officials, eviscerate the right of citizens to protect themselves, and silence whistle blowers. What is more, Sierra Club and U.S. PIRG are not alone in our opposition to S. 866; last month 120 environmental, public interest, labor, and business groups, representing millions of Americans, sent a letter to every U.S. Senator denouncing S. 866. That letter is attached to my statement as Appendix II.

III. STATE SECRECY AND IMMUNITY LAWS ARE HAVING A NEGATIVE IMPACT, AND A STRONG EPA OVERSIGHT ROLE MUST BE MAINTAINED

Many of the arguments we offer against Federal pollution secrecy and immunity proposals apply also to similar proposals enacted at the State level: they hurt our right to know, undercut enforcement, infringe on citizen enforcement rights, silence whistle blowers, allow lawbreakers to escape accountability and keep the profits they have gained from avoiding compliance, and disadvantage regulated entities that take their environmental responsibilities seriously. For these reasons, citizen groups in Idaho, Ohio, Colorado, Michigan, and Texas have petitioned the U.S. EPA to withdraw these States' authority to enforce Federal environmental laws in light of the obstacles these audit laws pose to enforcement, right to know, and victim compensation.

Nonetheless, U.S. EPA has entered into agreements with the States of Texas and Michigan, and is pursuing similar agreements in Ohio and other States, that have led to improvements in the respective States' self-audit laws, but, in the end, have given EPA's blessing to the existence of corporate secrecy rights in a State civil proceeding. In our view, the Texas and Michigan deals have the alarming result of allowing those States to continue implementing Federal programs despite serious constraints on the ability of the State and citizens to enforce those programs. Grassroots letters to EPA Administrator Carol Browner and President Bill Clinton outlining concerns with EPA's policy and recommending additional steps the administration should take are attached as Appendix III.

Although we are not satisfied with EPA's position regarding these States' audit laws, we strongly assert that there, is, nevertheless a critical need to preserve a Federal oversight role for EPA. The "safe harbor" concept that Senator Enzi is proposing would unduly limit EPA's authority to oversee its programs and would substantially undo many of the improvements EPA succeeded in obtaining from Michigan and Texas. Most notably, pursuant to agreements with EPA, Texas and Michigan have amended or agreed to amend their laws to ensure that secrecy privileges or immunity are not available with respect to criminal violations. Under Senator Enzi's approach, the standard for environmental criminal liability would be compromised, and reckless environmental violations currently considered criminal would be potentially subject to audit privilege and immunity protection.

In addition, the Enzi approach is misguided because it ties EPA's hands. As these new laws are played out in the courts, their impact on citizen suit rights and law enforcement will become more clear. EPA needs the flexibility to revisit its agreements regarding State audit laws into order to ensure the integrity of the programs it administers.

IV. INDUSTRY WANTS POLLUTION SECRECY AND IMMUNITY RIGHTS IN ORDER TO AVOID LIABILITY, NOT AS AN INCENTIVE FOR VOLUNTARY COMPLIANCE

As we observe the 25th anniversary of the Clean Water Act, we should consider the motivation for its passage and the passage of the other landmark environmental and health laws. These laws were not established because industry was doing a great job of voluntarily finding and eliminating pollution. These laws passed because the Cuyahoga River burned. The air in Chattanooga was not safe to breathe, the drinking water of New Orleans was filled with carcinogens and the people of Love Canal were sickened by toxic waste.

So why is it today that pollution is rarely just dumped untreated into rivers or unlined pits? After all, it is cheaper in the near term for a corporation or Federal facility to just dump its effluent and thereby externalize its disposal costs. We maintain, therefore, that it is fear of liability, fear of enforcement (Federal, State or citizen) and fear of adverse publicity that drives corporate behavior in the area of public health and the environment.

Our understanding of the current incentives which tend to keep corporations from just dumping it in the river is confirmed by the words of industry lawyers. An Arthur Anderson survey of corporate counsel published in the National Law Journal in 1992 states "the relatively new threat of jail for corporate executives for environmental violations is an overwhelming concern for general counsel."

Likewise, the advent of environmental pollution secrecy and immunity rights represents a sophisticated and superficially appealing new way to evade the threat of enforcement and avoid liability. Proponents of these new rights claim they provide necessary incentives to encourage companies to conduct internal audits of their environmental performance. However, as industry lawyer Roger Marzulla stated at a recent seminar on environmental crime hosted by the publication *Corporate Crimes Reporter,* the (real) purpose of self-audit laws is to provide "an obstruction to prosecution."

A. The Waste Management, Inc. Cincinnati Case

Industry's arguments in favor of corporate pollution secrecy and immunity rights are all based upon an assumption of corporate good faith. They ignore the vast potential for abuse inherent under rules that encourage concealment of information. The story of a small, Cincinnati, Ohio community group's fight to protect themselves from toxic gas emissions emanating from a nearby landfill operated by the corporate giant Waste Management, Inc. presents a compelling example of the various ways a corporation can and will attempt to use and abuse the right to withhold self-audit information under an audit privilege law. That story, as told by two community members who have led the fight against Waste Management, is attached as Appendix I.

B. Corporations Have Historically Used Attorney-Client and Work Product Doctrines To Hide Information and Escape Liability

The concept of the environmental audit privilege, then, emerges from industry think tanks and corporate law firms, not as an innovative compliance tool, but as a means of hiding the ball—a tactic that industrial polluters, especially large corporations that can afford extensive litigation, have pursued for years. Corporations have long attempted, with little success, to use the doctrines of attorney-client privilege and attorney client work product as a means of shielding themselves from accountability for activities harmful to the environment and public health. However, the courts have placed limitations on concealment via these doctrines, in order to safeguard the public's recourse. Now, the trend toward environmental privilege seems to be designed to open the door to many more environmentally important documents becoming concealable.

The attorney-client privilege relates to communication made by the client (or the client's agent) to an attorney, in confidence, for the purpose of obtaining legal advice. The privilege allows the client (either individually, or through his attorney) to decline a forced disclosure. The work-product doctrine protects against forced disclosure materials prepared specifically in anticipation of litigation. However, in such a case, the party seeking discovery may gain access if it can demonstrate a substantial need for them and inability to obtain the substantial equivalent elsewhere without undue hardship.

Corporations have often attempted, especially in recent cases, to stretch these doctrines so as to conceal factual information from those seeking accountability in enforcement cases and other contexts. The environmental audit laws represent an opportunity for corporations to conceal much more information, by characterizing a great many of the studies they wish to conceal, not as legal advice, but as "environmental audits." There are numerous examples of corporations attempting to stretch attorney client doctrines to avoid environmental accountability. A look at just a few examples demonstrates how much is at stake with environmental audit privilege:

Phelps Dodge Corporation. Phelps Dodge Inc. sold property to the U.S. Postal Service in Maspeth (Queens), New York, in the mid–1980's for construction of a postal distribution building. Phelps Dodge agreed to clean up the former copper refining site, but as the cleanup process continued it became apparent to Phelps Dodge and its contractors that heavy metal contaminants onsite—(*e.g.* arsenic, cadmium and lead) were more widespread and it would be much more expensive to clean up the site than anticipated. In response, Phelps Dodge officials—under the leadership of the company president—apparently employed a strategy of concealment to attempt to strap the Post Office and the U.S. taxpayers with the costs of cleanup. One major strategy was to claim attorney-client privilege for extensive studies conducted by consultants documents revealing information relevant to the extent of contamination and costs of cleanup. In 1994 the court reviewed these attorney-client privilege claims, document by document, and found that about 80 percent of the documents were ineligible for such treatment. The court issued an explicit ruling, with a six page long list showing the numerous studies, letters and evaluations that the company inappropriately attempted to keep out of government hands.

The lengthy list of documents which the company had attempted to cover as "privileged" included many documents which had merely been copied to attorneys, and others in which attorneys had no real role. *U.S. Postal Service* v. *Phelps Dodge Refining Corp.* 852 F Supp. 156 (E.D.N.Y. 1994). The court noted that the data were "generated through studies and collected through observation of the physical condition of the Property . . . Such underlying factual data can never be protected by attorney-client privilege and neither can the resulting opinions and recommendations."

In contrast, many of the State environmental audit laws allow precisely such onsite observations, resulting opinions and recommendations to be given privileged treatment at great detriment to public accountability. Had these documents remained out of public view in the Phelps Dodge matter the government may have been incapacitated from winning the later court decision, in 1997, finding that Phelps Dodge had breached its contract with the U.S. Postal Service by delaying and declining its contractual responsibility to excavate all of its contamination." The court might not have had enough information before it on the scope of contamination to rescind the contract, ordering the corporation to take back the tainted property sold to the Postal Service. *U.S. Postal Service* v. *Phelps Dodge* refining Corporations 950 F Supp. 504 (E.D. NY, 1997).

Summitville Mine. Summitville Consolidated Mining Company filed for bankruptcy in 1992, leading to an emergency takeover of cleanup of its cyanide leach gold mine near Del Norte, Colorado by the U.S. EPA. After the Federal Environmental Protection Agency (EPA) examined the situation, the site became the State's best known Superfund cleanup project. According to an article in the Denver Post on May 15, 1997, some of Summitville's officers filed a lawsuit in Canada to keep about 1,800 documents related to the operation of the Mine from a grand jury, claiming the cover of attorney-client privilege. The documents sought include details of discussions with regulators and mine consultants, records discussing "drainage, flows, discharges, seeps, spills or runoff" as well as finances. At stake is liability for an estimated $120 million cleanup.

Tobacco Cases. Outside of the environmental field, we can see the damage that "audit privilege" could do in the high profile tobacco cases. In those matters, attorneys attempted to bring all potentially damaging internal scientific documents under attorney work product and attorney-client privilege to avoid discovery. One witness reported that Brown and Williamson's assistant general counsel routinely marked scientific research papers "attorney work product" even when they had not been created for use in litigation.

Finally, some other examples of demonstrating the history of corporate attempts to withhold information regarding environmental problems include:

• According to the August 22, 1995, Columbus, Georgia, Ledger-Enquirer, "The DuPont Co. was slapped with sanctions totaling almost $115 million on Monday by U.S. District Judge K. Robert Elliott of Columbus, who ruled the chemical company systematically lied, cheated and withheld evidence in efforts to protect itself during

lawsuits over its fungicide Benlate." Unfortunately, Judge Elliott was reversed on appeal and the growers are still fighting to recover.

• According to the Associated Press on July 15, 1997, "the man investigating the Texaco tapes said Monday he found a file—carefully labeled—containing documents company executives allegedly withheld from lawyers in a race discrimination case . . . the folder had a yellow note on it labeled 'documents withheld from legal'."

C. Editorial Boards, District Attorneys, and Others Oppose Secrecy and Immunity Laws As Industry Campaign To Hide Dirty Secrets

Most people who review this corporate campaign for secrecy and immunity see it for what it really is. Dozens of editorial writers have railed against the concept calling it a 'Polluter Protection Act', 'Polluters Relief Act', 'Dirty Secrets' and the 'Bhopal Bill'. A few of those editorials are included in Appendix IV.

In a June 7, 1996 letter, to Congressman Condit, the Co-Chairs of the National District Attorneys Association wrote, "it is our view that the adoption of a self-audit privilege is an extreme measure far beyond any remedy necessary. Furthermore, that if the Congress enacts a self-audit privilege you will be doing a vast disservice to law enforcement efforts not only in the realm of environmental law, but across the spectrum of 'white collar' crime."

The Charleston, West Virginia Gazette observed, "more than 4,000 people were killed in Bhopal, India by a leak at the Union Carbide plant in 1984. If such a tragedy ever occurred at a Carbide plant in West Virginia—God forbid—we're sure the company would loved to be able to hide information about conditions leading up to the accident."

Stephanie Kessler of the Wyoming outdoor Council said, "This bill is about big companies that already do environmental audits to now legally hide the information they discover from the public . . . They get the privilege even if they don't do a thing." Jack McGraw, acting EPA Regional Administrator in Denver, "The Colorado bill is the worst of the worst. It has all kinds of abuse."

D. Pollution Secrecy and Immunity Laws Are Completely Unnecessary To Accomplish Their Purported Goals

Finally, having shown that bad actors can and will abuse environmental audit privileges and immunity rights, it worth noting in conclusion that the legitimate purported goals of these audit privilege proposals—namely to encourage self-audits and voluntary compliance while providing some measure of protection for those who self-disclose violations—are already being accomplished by EPA's self-audit/self-policing policy with notable success. EPA's policy, which was the developed through a lengthy and exhaustive multi-stakeholder process, contains NO secrecy privilege, NO immunity for criminal violations, and NO automatic immunity for civil violations, but does allow for significant mitigation of civil penalties for self-disclosed violations in appropriate cases. Under the policy, hundreds of companies have disclosed violations, and EPA has waived penalties in most cases.

V. CONCLUSION

Thus, the conclusion is clear. Pollution secrecy and immunity laws are an unnecessary attack on environmental law enforcement and the public's right to know about pollution. Such proposals present numerous opportunities for abuse, and lawbreaking companies have a demonstrated track record of using any and every tool available to hide information and avoid responsibility. Therefore, Sierra Club and U.S. PIRG strongly urge members of the Senate to oppose S. 866 and any proposal that would limit EPA's oversight authority with regard to State pollution secrecy laws.

Thank you for the opportunity to testify today.

APPENDIX I

Testimony of Linda Briscoe and Rev. Solomon Lundy
Co-Chairs of the Toxics/Pollution Committee of Communities United for Action

before the

Committee on Environment and Public Works of the United States Senate

Testimony of Linda Briscoe and Rev. Solomon Lundy
Co-Chairs of the Toxics/Pollution Committee of Communities United for Action*
before the
Committee on Environment and Public Works of the United States Senate

Mr. Chairman and Members of the Committee

We are pleased to have the opportunity to provide you with written testimony concerning our experiences with a multi-national, giant corporation's use and abuse of environmental secrecy and audit privilege bills. The lessons we wish to share in this testimony were learned in attempting to find out about toxic landfill gas migration from one of Waste Management's landfills in Cincinnati, Ohio. We were forced to organize to protect ourselves because, time and time again, local and state authorities did not protect us. They were willingly or carelessly misled by Waste Management.

Waste Management's ELDA Landfill has operated since approximately 1973 in the midst of a densely populated urban area, the most densely populated zip code in Cincinnati. Thousands of low income people live within 2000 feet of the landfill. Our members and neighbors include the elderly, babies, teens and pregnant women. The operations of ELDA and its gas migration have robbed those of use who live near the landfill of the use of our yards, the ability to have our windows open in the summer and have eroded the quality of our lives. We are left with questions about our years of exposure to the gas and the pattern of health problems seen at our local clinic. We had a right to know about our gas exposure years ago.

Our concerns have a basis. The landfill was not built according to modern standards. It was supposed to close after about 10 years of operation. It is still in operation 24 year later. The substantial quantities of landfill gas generated by this landfill escape through subsurface sand seams, fissures and cracks in subsurface rock. The odors that we detected off-site present a constant reminder of landfill gas migration. With these facts in mind, we need to review what Waste Management kept secret from us:

The non-methane portion of the gas includes benzene, ethyl benzene, toluene, xylene, 1-1-1tri-chloroethane, ethylene chloride, trichloroethane, vinyl chloride and many other chemicals

Exposure to these chemicals can affect the liver, kidney, respiratory systems, eyes, and skin. Several of these chemicals are carcinogenic.

Generation rates of landfill gas will not peak until after the landfill is finally closed. Because of legal maneuvering, this will not happen until at least 1998. Our community's history of concern over the landfill goes back over a decade. When we explained our neighborhood concerns and the symptoms of gas migration to authorities, no one listened to us. They did listen to Waste Management. Finally, in the 1980's one of four housing developments near the landfill was outfitted with methane gas monitors in the homes to detect methane at explosive levels (i.e. 20,000 parts per million). We were not told of the dangers (at less than 1 ppm) of the non-methane components of the landfill gas and of our exposure to these chemicals.

*Communities United For Action ("CUFA") was formed in 1980 and is composed of 13 communities including 46 neighborhood groups. Its membership is racially and economically diverse. Linda Briscoe is and has been a resident of a neighborhood next to the landfill since approximately 1981. Rev. Lundy's church is near the landfill and a large percentage of his congregation lives in the surrounding community.

Waste Management even went so far as to deny existence of the flare which residents had seen burning methane gas every night. Eventually, Waste Management admitted that they had been burning methane (initially without a permit) in an effort to control landfill gas.

The methane monitoring system that was installed in the one housing development turned out to be fraud and a charade, as evidenced by sworn testimony in a permit hearing noted below.

Every time we told someone about the odors of the gas, we were told there were other chemical companies in the neighborhood and that we were probably smelling their pollution. However, we learned (ironically on public relations tours of ELDA) that the odors we were smelling came from the ELDA Landfill.

Not satisfied with extending the life of the landfill twice beyond its original projection, Waste Management actually tried to expand (again) over and around the existing inadequately constructed landfill. The community found two pro bono environmental lawyers to oppose the expansion. They conducted many weeks of discovery and then represented us at a five week hearing in Columbus.

During the weeks of discovery, our lawyers were supplied with fragmented pieces of the gas information and they managed to piece many of these together. Waste Management, however refused to give computerized management compliance reports (which they called "audits") that comprehensively put together the facts concerning the gas migration into the community (we have attached an example to our testimony). Based on its assertion that its internal "audits" were confidential and privileged, Waste Management hid the gas migration information from the surrounding community

Because our lawyers persisted, they were finally given the so-called audits in the middle of the administrative hearing on the expansion of ELDA. Waste Management used a non-existent "self-evaluation privilege" and the existence of the pending Ohio audit bill to withhold these documents. When Waste Management's legal maneuvers failed - because the bill had not yet-passed into law - our lawyers were able to put the whole puzzle together and show what Waste Management knew and when Waste Management knew it about gas migration. They showed how Waste Management had been able to throw off state and local officials even though Waste Management knew that the gas was migrating from its ELDA Landfill.

Further, the document trail showed that Waste Management's own consultants had told them what had to be done to fix the problem. Waste Management failed to take these steps. Most importantly, the documents showed why taking such steps (e.g. doing hydrogeologic investigations and tracing the sand seams, fissures and cracks) was vital before any meaningful gas control could be established.

After we won our hearing blocking ELDA's expansion, the Ohio legislature passed the audit privilege bill. Waste Management promptly asked the Director of the Ohio EPA to force us to give their "audits" back! The Director declined because the bill had not yet been signed into law and government entities (the Ohio EPA and US EPA already had the documents in their open records files.

Armed with the information we learned, we gave Waste Management a written notice that detailed their violations of federal law. Waste Management did nothing to respond to us and CUFA filed a federal lawsuit to enforce the federal laws that were violated.

After we filed our suit, the Director of the Ohio EPA used the information we gathered to issue a state order ordering ELDA to abate the migration of the explosive landfill gas. The toxic and other hazardous properties of gas were not mentioned in the order. The focus of our federal suit is the toxic and hazardous properties of the gas, not just its explosion potential.

Our federal suit seeks to require Waste Management to do what its own consultants have recommended concerning a subsurface internal evaluation of the landfill and abatement of all migration.

When we started "discovery" in our federal case, Waste Management, remarkably, used the existence of Ohio's audit law (which had been signed by the Governor of the State of Ohio with an effective date of March, 1997) to keep from giving us the same documents which they had already produced in the state case (they also withheld audits which deal with ground water and other related issues that were beyond the scope of our discovery in the administrative hearing.)

Finally, after months of stalling and delay and intense questioning by national media, Waste Management presented at least some of the audit information that we had requested. However, steps are still being taken to verify whether all Of the so-called audits have been produced.

At the same time that Waste Management finally produced at least some of this "audit" information, Waste Management filed a motion asking the federal court to abstain from hearing our federal claims. Waste Management is seeking to have the federal court send the case back into the state system where the new state law will preclude us from using the information that we have been given.

These circumstances have led us to ask the members of this Committee to consider the following:

1. If one of the national architects (Waste Management) of the state audit privilege movement, is capable of making this use of a pending bills (before the bill has passed) and if such a company will apply pending legislation to "audits" that were completed prior to the date of the passage of an audit bill, what basis is there to believe that other polluters will reveal similar facts!

2. What would have happened to us if our community had not had aggressive pro bono lawyers to get the information and if the national media spot light had not been on the polluter?

3. Finally, how will any one know it when a polluter has secretly slipped the truth about its pollution into a file which the polluter has labeled "AUDIT".

We would be happy to discuss any and all of these matters with the staff of this Committee and its Members and we would be happy to share with you the transcripts of the sworn testimony of Waste Management officials and of ourselves during the permit hearing before the Ohio Environmental Protection Agency.

APPENDIX II

Grassroots Letter to U.S. Senators
Opposing Hutchison/Lott "Environmental Protection Partnership Act"
(S. 866)
September 5, 1997

POLLUTION SECRECY BILL WILL HURT THE PUBLIC'S RIGHT TO KNOW, UNDERCUT LAW ENFORCEMENT AND SILENCE WHISTLE BLOWERS

September 5, 1997

Dear Senator:

We, the undersigned organizations, businesses and concerned members of the public, are writing to express our unqualified opposition to "The Environmental Protection Partnership Act" (S. 866), recently introduced by Senators Kay Bailey Hutchison (R-TX) and Trent Lott (R-MS). This bill would allow industries to conceal environmental and safety studies ("self-audits") from scrutiny by the government and the public, and immunize companies from civil, and even some criminal, penalties when companies discover violations in self-audits, and voluntarily disclose and promise to correct the violations.

S. 866 Undermines The Public's Right To Know

Proponents of these new pollution secrecy and immunity rights claim they will promote voluntary compliance with environmental laws. In reality, by establishing a broad secrecy "privilege" for information contained in environmental audits, S. 866 would seriously **undermine the public's right to know**. Allowing companies to designate internal paper trails or data relating to environmental problems as a secret "audit" would keep citizens in the dark, while benefiting only those with something to hide. Without access to the wide range of factual information companies would be authorized to conceal, the victims of harmful pollution practices will be prevented from obtaining protection and redress.

S. 866 Silences Whistle Blowers

What is more, the bill would **silence whistle blowers**. By forbidding employees from testifying regarding a facility's environmental audit in any court or proceeding, S. 866 would have a chilling effect on workers who might otherwise provide information on health and safety hazards at their plants for the well-being of their co-workers and communities. The bill would also give employers a new tool to intimidate and retaliate against employees who do come forward. Furthermore, S. 866 would let stand state pollution secrecy laws that actually punish whistle blowers for disclosure of "privileged" environmental secrets. Currently in some states, a plant employee who notifies neighbors that the plant is polluting their drinking water can be held personally liable for penalties the company has to pay as a result of the disclosure of its violations. A government-employed whistle blower under similar circumstances could go to jail. S. 866 would permit states to implement and enforce federal environmental standards under these unfair conditions.

S. 866 Undercuts Environmental Law Enforcement

In addition, this legislation would severely **undercut environmental law enforcement** by giving violators immunity from civil, and even some criminal, penalties when environmental violations are voluntarily disclosed and steps are taken to begin to correct them. Removing accountability would encourage abuse, reward scofflaws by allowing them to profit from violations, and disadvantage companies that take their environmental responsibilities seriously. Moreover, under S. 866 polluters who recklessly endanger the public health in ways that would be considered criminal under current standards could get off without penalty by merely apologizing and promising to make amends.

Most importantly, S. 866 would **eviscerate the right of citizens to enforce federal environmental laws**. Recognizing that citizens affected by pollution violations are often the only ones willing to take

firm action, Congress had the vision to preserve a critical role for the public as partners in enforcement in many of our national environmental laws. However, by denying public access to vital information and shielding violators from penalties, this bill will effectively strip from citizens' hands the legal tools we need to protect ourselves and to hold violators accountable.

Rates of non-compliance with environmental laws remain persistently high. A recent U.S. PIRG study of Environmental Protection Agency (EPA) data found that one in five major polluters was in significant violation of the Clean Water Act during a recent period. Congress should be giving environmental law enforcement agencies and their citizen partners more tools to do their jobs, not tying their hands and letting polluters police themselves.

S.866 Is Unnecessary

Finally, S. 866 **is completely unnecessary**. The bill's legitimate goals - to encourage environmental self-auditing and promote voluntary compliance - can be, and are being accomplished WITHOUT secrecy "privileges" and immunity "incentives" that hurt our right to know, excuse serious violations, and inflame public distrust. More and more companies are utilizing self-auditing as a compliance tool. Meanwhile, there is no evidence that "audit privilege" laws similar to S. 866 enacted at the state level have brought about any significant improvement in environmental compliance.

The EPA's Audit/Self-Policing Policy is already accomplishing this bill's goals with notable success. Under EPA's policy, which contains NO secrecy privilege and NO immunity for criminal violations, but mitigates civil penalties for self-disclosed violations in appropriate cases, 105 companies have disclosed violations at 350 facilities in the past year, and EPA has already settled matters with 40 companies and 48 facilities, waiving penalties in most cases.

The conclusion is clear: S. 866 is an unnecessary attack on environmental law enforcement, workers, and the public's right to know about pollution. We strongly urge you to oppose this legislation.

In addition, before you make a final decision to support or co-sponsor this legislation, we respectfully request an opportunity for a representative group from the public interest community to meet with you or your staff regarding this critical issue. Please contact U.S. PIRG staff attorney Todd Robins at (202) 546-9707.

Sincerely,

U.S. Public Interest Research Group (U.S. PIRG)	Washington	DC
NRDC	Washington	DC
Environmental Defense Fund	Washington	DC
Sierra Club	Washington	DC
Earth Justice Legal Defense Fund	Washington	DC
National Wildlife Federation	Washington	DC
Government Accountability Project	Washington	DC
Rural Coalition	Washington	DC
20/20 Vision	Washington	DC
Greenpeace USA	Washington	DC
Center for Marine Conservation	Washington	DC
Physicians for Social Responsibility	Washington	DC
Cook Inlet Keeper	Homer	AK

Alaska Forum For Environmental Responsibility	Valdez	AK
Alaska Clean Air Coalition		AK
Alaska Center for the Environment		AK
Alabama Rivers Alliance		AL
Alabama Environmental Council	Birmingham	AL
Professor Naomi Roht-Arriaza, UC Hastings College of Law	San Francisco	CA
Planning and Conservation League	Sacramento	CA
Environmental Defense Center	Santa Barbara	CA
Earth Island Institute/Bluewater Network	San Francisco	CA
Klamath Forest Alliance	Etna	CA
California Communities Against Toxics		CA
Phred Records	Costa Mesa	CA
Oil, Chemical and Atomic Workers Union	Lakewood	CO
Western Colorado Congress	Montrose	CO
Long Island Soundkeeper Alliance	Stamford	CT
University of Delaware Student Environmental Action Coalition	Newark	DE
Glynn Environmental Coalition	St. Simons Island	GA
Georgia Chapter of Sierra Club		GA
Iowa Chapter of Sierra Club	Des Moines	IA
Izaak Walton League of IA	Des Moines	IA
Information Technology Services (ITS), University of Iowa	Iowa City	IA
Idaho Conservation League	Boise	ID
Idaho Rural Council	Boise	ID
Uptown Recycling Inc.	Chicago	IL
Republicans for Environmental Protection (REP America)	Dearfield	IL
Valley Watch, Inc.	Evansville	IN
Kansas Chapter of Sierra Club		KS
Kentucky Resources Council, Inc.		KY
Democracy Resource Center	Lexington	KY
Tulane Institute for Environmental Law and Policy	New Orleans	LA
Delta Greens	New Orleans	LA
Gulf Restoration Network	New Orleans	LA
Pollution Solution	Lafayette	LA
Louisiana Coalition for Tax Justice		LA
Greater Boston PSR	Boston	MA
Watershed Defense Fund	Bellingham	MA
Woods Hole Oceanographic Institution	Woods Hole	MA
Massachusetts Chapter of Sierra Club		MA
National Environmental Law Center	Boston	MA
Safer Waters in Massachusetts (SWIM)	Nahant	MA
Environmental Research Foundation	Annapolis	MD
Ozark Chapter of Sierra Club	Columbia	MD
Chesapeake Bay Foundation	Annapolis	MD
Assateague Coastal Trust	Berlin	MD
Maryland Conservation Council	Marriotsville	MD
Michigan Environmental Council	Lansing	MI
Ecology Center of Ann Arbor	Ann Arbor	MI
Tip of the Mitt Watershed Council	Conway	MI

The Minnesota Project	Canton	MN
Mississippi 2020 Network	Jackson	MS
Montana CHEER (Coalition for Health, Environmental and Economic Rights)	Missoula	MT
Western Organization of Resource Councils	Billings	MT
Northern Plains Resource Council	Billings	MT
Native Forest Network	Missoula	MT
Conservation Council of North Carolina		NC
Concerned Citizens of Tillery	Tillery	NC
North Carolina Coastal Federation		NC
Dakota Resource Council	Dikinson	ND
New Jersey Environmental Lobby		NJ
New Jersey Chapter of Sierra Club	North Haledon	NJ
University of New Mexico	Albuquerque	NM
Citizen Alert		NV
Great Lakes United	Buffalo	NY
Action for the Preservation and Conservation of the North Shore of Long Island	Huntington	NY
Fish Unlimited		NY
Hudson River Sloop Clear Water	Poughkeepsie	NY
Fulton Safe Drinking Water Action Committee (FSDWAC) for Environmental Concerns, Inc.	Fulton	NY
Ohio Citizen Action		OH
Rivers Unlimited		OH
Oregon Shores Conservation Coalition	Depoe Bay	OR
Northwest Environmental Advocates	Portland	OR
Physicians for Social Responsibility	Salem	OR
Raymond Profitt Foundation	Langhorne	PA
Pennsylvania Chapter of Sierra Club	Pittsburgh	PA
Keystone Action Network	Erie	PA
Professor Lawrence A. Weil, Rhode Island College		RI
Lone Star Chapter of Sierra Club	Austin	TX
Citizens League for Environmental Action and Recovery (CLEAR) Environmental Education and Advocacy	Manville	TX
Galveston-Houston Association for Smog Prevention (GHASP)	Houston	TX
Citizens Aware and United for a Safe Environment (CAUSE)	Midlothian	TX
People Against Contaminated Environments (PACE)	Beaumont	TX
Citizens Environmental Council of Channelview	Channelview	TX
The Chemical Connection, A Public Health Network of Texans Sensitive to Chemicals	Austin	TX
Downwinders at Risk (DAR)	Midlothian	TX
Groups Allied to Stop Pollution	Wilmer	TX
Citizens to Save Lake Waco	McGregor	TX
North Channel Concerned Citizens Against Pollution	Channelview	TX
Citizens Against Local Landfills	Conroe	TX
Environmentally Concerned Citizens	Grangerland	TX
Texans United	Houston	TX
Citizens Environmental Coalition	Houston	TX
Friends Insist Stop Toxic Waste (FIST)	Houston	TX

Mothers for Clean Air	Houston	TX
All Friends United	Lubbock	TX
Houston Group of Sierra Club	Houston	TX
Friends United for a Safe Environment (FUSE)	Texarkana	TX, AR
CCHW - Center for Health, Environment and Justice	Falls Church	VA
Washington Toxics Coalition		WA
Inland Empire Public Lands Council	Spokane	WA
Wise Use Movement	Seattle	WA
Citizens for Safe Water Around Badger	Merrimac	WI
Powder River Basin Resource Council	Sheridan	WY
Markham Center		
Education Access - West		
Desert Citizens Against Pollution		
Hi-Desert Citizens Against Pollution		

APPENDIX III

Grassroots Letters to
EPA Administrator Carol Browner and President Bill Clinton
Regarding Administration Policy On State Audit Privilege Laws

Presented March 24, 1997
Resubmitted With Additional Signatories October 27, 1997

Ms. Carol Browner
Administrator
USEPA
401 M. St SW
Washington DC 20460

Dear Administrator Browner,

As you know, 23 states have enacted environmental audit protection laws. Most of these laws provide a "privilege," allowing regulated facilities to conceal environmental studies relevant to law enforcement and environmental accountability. Other provisions of these laws provide for outright immunity from prosecution for companies who disclose and self-correct violations as a result of auditing. While these laws have been enacted under the guise of "proactive" environmental policy, we believe that the actual result of such privileges and immunities is that many neighborhoods and workplaces are less safe than they once were, because polluters have new tools of concealment and absolution allowing them to resist efforts to clean them up.

These laws create a dumping grounds for corporate "dirty secrets" and will allow some law-breakers to retain the financial fruits of their previous disregard for the law. They also interfere with workers' rights to serve as watchdogs of environment and safety issues. We have already seen examples of companies who have tried to use the audit laws to escape responsibility and even to continue polluting with impunity. We are writing to encourage you to take stringent action to ensure that these laws do not continue to undermine the integrity of our environmental law system.

As you know, some of the signatories of this letter have already filed petitions with the EPA calling for the revocation or denial of federal environmental delegation in specific states and programs. This letter is a call for additional, broader action by the Administration.

We are aware of and appreciative of the generally strong statements of policy by the Administration to the states that have enacted these laws, including direct placement of some states (e.g., Idaho and Texas) on formal notice that they risk never receiving final federal environmental delegation if they do not repeal or amend their audit laws. However, we believe more aggressive action is needed to defend the public's Right to Know and ensure corporate accountability for environmental compliance. Specifically, we are writing to urge that the EPA do the following:

1) Continue to move forward with formal action to revoke or deny federal program delegation to states that have enacted audit privilege or immunity laws. Such action should be taken if privilege or immunity may affect either civil or criminal law prosecution under federal environmental laws. A moratorium should be established on new program delegations for states that have enacted environmental audit privilege or immunity laws.

2) Act on the citizen petitions received from organizations in Colorado, Ohio, Texas, Michigan and Idaho by commencing formal withdrawal proceedings, including public hearings in the states where requested by the petitioners.

3) Require audit law states to provide immediate notice and opportunity for comment to the EPA and the public when any claim of privilege or immunity is made during enforcement, inspection or other contexts.

4) In instances where the audit laws interfere with state enforcement capabilities, EPA should take direct "over-filing" enforcement action against law breakers consistent with the EPA's own audit policy.

In addition, we are writing today to President Clinton to ask that he do his part to help roll back the poor public policies embodied in audit laws. We are aware of and appreciative of the letter that Steve Herman Assistant Administrator, EPA's Office of Enforcement and Compliance Assurance and Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division of the Justice Department have sent to federal agencies recommending that federal agencies "take all steps necessary, including the issuance of policies and directives" to ensure that no federal agency or contractor operating a federal facility would avail themselves of these laws. We believe that Presidential level action is needed to reinforce and expand this approach.

In the enclosed letter we ask that the President issue an Executive Order requiring all federal agencies to instruct their personnel, contractors and other enterprises receiving or renewing federal grants, loans, or other subsidies that they must not use state environmental audit laws to conceal information obtained through an environmental audit, nor claim immunity for environmental violations discovered and disclosed through an audit. Such an Executive Order is consistent with the spirit of President Clinton's previous Executive Order, Number 12856, August 3, 1993 requiring federal agencies to comply with Right to Know laws and to plan for pollution prevention. The new Executive Order we are requesting would encompass more facilities (contractors and subsidy recipients) than the statement issued by the above-named enforcement officials, and would be binding in its effect. We request that you, as EPA Administrator, support such an Executive Order and work with the President to bring about its issuance.

We appreciate the Administration's responsiveness to date on this issue. We hope that these two proposals will help to further roll back the tide of bad policy which encourages environmental secrecy and undermines corporate environmental accountability.

William Jefferson Clinton
President
White House
Washington, DC

Dear President Clinton,

As you may know, 23 states have enacted environmental audit protection laws. Most of these laws provide a "privilege," allowing regulated facilities to conceal environmental studies relevant to law enforcement and environmental accountability. Other provisions of these laws provide for outright immunity from prosecution for companies who disclose and self-correct violations as a result of auditing. While these laws have been enacted under the guise of "proactive" environmental policy, we believe that the actual result of such privileges and immunities is that many neighborhoods and workplaces are less safe than they once were, because polluters have new tools of concealment and absolution allowing them to resist efforts to clean them up.

These laws create a dumping grounds for corporate "dirty secrets" and will allow some law-breakers to retain the financial fruits of their previous disregard for the law. They also interfere with workers' rights to serve as watchdogs of environment and safety issues. We have already seen examples of companies who have tried to use the audit laws to escape responsibility and even to continue polluting with impunity.

We are writing today to you, and to EPA Administrator Carol Browner, to encourage you to take stringent action to ensure that these laws do not continue to undermine the integrity of our environmental law system. As you may know, some of the signatories of this letter have already filed petitions with the EPA calling for the revocation or denial of federal environmental delegation in specific states and programs. We have written a separate letter to EPA Administrator Browner to address this issue further. This letter is a call for additional, broader action by you, through your power to issue an Executive Order.

We are aware of, and appreciative of, the letters that Steve Herman Assistant Administrator, EPA's Office of Enforcement and Compliance Assurance and Lois Schiffer, Assistant Attorney General, Environment and Natural Resources Division of the Justice Department have sent to federal agencies recommending that federal agencies "take all steps necessary, including the issuance of policies and directives" to ensure that no federal agency or contractor operating a federal facility would avail themselves of these laws. However, we believe more aggressive action will be needed by you to fully defend the public's Right to Know and ensure corporate accountability for environmental compliance.

Specifically, we ask that you issue an Executive Order requiring all federal agencies to instruct their personnel, contractors and other enterprises receiving or renewing federal grants, loans, or other subsidies that they must not use state environmental audit laws to conceal information obtained through an environmental audit, nor claim immunity for environmental violations

discovered and disclosed through an audit. Such an Executive Order is consistent with the spirit your previous Executive Order, Number 12856, August 3, 1993 requiring federal agencies to comply with Right to Know laws and to plan for pollution prevention. The new Executive Order we are requesting should encompass more facilities (contractors and subsidy recipients) than the statement issued by the two above-named enforcement officials, and should be binding in its effect.

We appreciate the Administration's responsiveness to date on this issue. We hope to work with you to make this proposed Executive Order a reality, to further roll back the tide of bad policy which encourages environmental secrecy and undermines corporate environmental accountability.

Endorsers of Letters to Carol Browner and Bill Clinton on State Environmental Audit Laws

Initial Endorsers March 24, 1997

Sanford Lewis, Chair
Network Against Corporate Secrecy
and Director, the Good Neighbor Project Sustainable Industries

Ross Vincent, Chair
Environmental Quality Strategy Team
the Sierra Club

Robert Shavelson,
Cook Inlet Keeper,
Homer, Alaska

Sandy Buchanan
Ohio Citizen Action

Richard Sahli, Esq., Chair,
Environment Committee
Ohio Academy of Trial Lawyers

Pam Kautter, Chair, Environmental Audit Issue Team,
Western Organization of Resource Councils

B. Suzi Ruhl, J.D., M.P.H., Director
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APPENDIX IV

Published Editorials Opposing State Audit Privilege Laws

Tribune Papers, Mesa, AZ
Denver Post, Denver, CO
Miami Herald, Miami, FL
The Gainesville Sun, Gainesville, FL
The Tampa Tribune, Tampa, FL
St. Petersburg Times, St. Petersburg, FL
Tallahassee Democrat, Tallahassee, FL
Atlanta Constitution, Atlanta, GA
Lansing State Journal, Lansing, MI
Riverfront Times, St. Louis, MO
Billings Gazette, Billings, MT
Bozeman Daily Chronicle, Bozeman, MT
Great Falls Tribune, Great Falls, MT
The News & Observer, Raleigh, NC
The Virginia Pilot and The Ledger Star, Richmond, VA
Charleston Gazette, Charleston, WV

Articles kept in committee files

PREPARED STATEMENT OF ROBERT C. BUNDY, U.S. ATTORNEY, DISTRICT OF ALASKA, AND LOIS J. SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

I. INTRODUCTION

We are submitting the views of the Department of Justice on audit and self-disclosure policy issues because of the great importance of these issues to effective law enforcement. Our statement briefly outlines the Department's concerns. Although the Department of Justice was not invited to testify at this hearing, we would welcome the opportunity to address these issues in greater depth.

Many prosecutors at the local, State and Federal levels—including United States Attorneys across the Nation—have grave concerns that laws creating an evidentiary privilege for environmental audits, and bestowing immunity on violators who "voluntarily" disclose their violations, seriously threaten our ability to protect the public through the enforcement of the environmental laws. While the Department of Justice fully supports the use of self-auditing as a means to ensure compliance with environmental laws, we strongly oppose audit privilege and disclosure immunity legislation such as S. 866.

II. AUDIT PRIVILEGE AND DISCLOSURE IMMUNITY LAWS ARE NOT NEEDED TO ENCOURAGE ENVIRONMENTAL AUDITING AND COMPLIANCE

The Environmental Protection Agency ("EPA") and the Department of Justice have adopted and implemented policies designed to encourage both compliance auditing and candid disclosure of identified violations. Those policies are working. Neither the Department nor EPA routinely requests audit reports from a regulated entity until there is an independent basis for believing that a violation of law has occurred; and when companies do perform audits, disclose the existence of violations uncovered by those audits, and correct those violations, the Department's enforcement record over many years demonstrates our commitment to give such actions great weight when deciding the appropriate government response. While proponents of audit privilege and disclosure immunity law have argued that legislation is needed to ensure that environmental audits performed by well-meaning companies are not misused by government agencies and Federal prosecutors, the fact is that such laws are not only unnecessary; they are bad public policy that will hinder enforcement of the law and interfere with the public's right to know about threats to human health and the environment.

A. Justice Department Policies

In order to encourage audits and compliance, in July 1991 the Department of Justice issued a guidance memorandum for prosecutors making decisions involving environmental crimes. In making such decisions, prosecutors are to consider whether there has been: (1) prompt and complete disclosure; (2) cooperation; (3) preventative measures and compliance programs; and (4) correction of the violation. The basic message of the guidance is that good-faith efforts by a violator to identify and prevent problems, report them, and promptly fix them, should be among the factors taken into account in prosecutorial decisionmaking (the other factors including State of mind, duration of the violations, human health or environmental effects, and whether the violations reflected a common attitude within an organization). Such efforts may even have a mitigating effect sufficient to convince prosecutors that a case should not be brought criminally at all.

This Department of Justice policy is yielding positive results. When the Potomac Electric Power Company (PEPCO) determined that pollutants had been unlawfully discharged for years from one of its facilities in Maryland, it disclosed that fact to the Federal Government and cooperated with authorities. As a result, PEPCO was not prosecuted criminally, but the person actually responsible for the violations was charged.

A case from Alaska similarly illustrates the favorable treatment that a forthright and cooperating company can receive under the Department's 1991 policy. When Russell Metals, Inc. learned that managers of recently acquired corporate subsidiaries, the White Pass Alaska companies, were under investigation for trying to cover up a large oil spill into the Skagway River, it cooperated with the Alaska United States Attorney's Office by fully disclosing the circumstances of the oil spill, the cover-up, and other of the White Pass companies' environmental violations. The White Pass companies' CEO and a contractor were prosecuted, as were the White Pass companies. But as a result of Russell Metals' cooperation and disclosure, Russell Metals was not prosecuted at all.

Likewise, in a South Dakota case involving a meat-packing plant, when a parent corporation, Chiquita Brands, learned from an internal investigation that its subsidiary, the John Morrell Company, was repeatedly violating the Clean Water Act by dumping slaughterhouse waste into the Big Sioux River and deliberately submitting falsified reports to conceal its crimes, Chiquita forced Morrell to disclose the violation to Federal authorities. Morrell and several employees, who had known of the violations for years but had done nothing to correct or stop them, were prosecuted for the violations, but Chiquita was not.

These examples demonstrate the effect that the Justice Department's policy is having in prosecutions around the country. When companies work to identify and prevent non-compliance through audits, come forward promptly when they do discover violations, and quickly correct the violations, the Department's prosecutors take those actions into account in making decisions about charging and sentencing. Forthright and responsible companies receive appropriate consideration from the government, but prosecutors are not hampered in their ability to go after the people and entities that need to be pursued.

B. EPA Policies that the Justice Department Applies

In 1995 EPA took another important step toward encouraging compliance audits when it published its "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," which addresses how the Agency will treat both compliance audits and self-disclosure of violations. 60 Fed. Reg. 66706 (Dec. 22, 1995).

In that statement EPA explained that, if certain specified conditions are met, it: will not seek penalties or, under specific circumstances, will seek only reduced levels of "gravity-based" penalties (*i.e.* penalties based on the seriousness of the violation), while retaining the ability to recover financial gains that otherwise would give violators an economic advantage over their law-abiding competitors; will not refer violations to the Justice Department for criminal prosecution if the violations did not involve either managerial concealment of offenses or high level involvement in, or blindness toward, violations (while reserving the ability to proceed against responsible individuals); and will not routinely request audit reports at the onset of its civil or criminal investigations. We concur with Assistant Administrator Steven Herman that that policy is working. It provides the appropriate level of incentives for companies to audit and report the results of audits, without jeopardizing the ability of the government to protect the public from threats to human health and the environment, and to ensure that the environmental laws are enforced effectively around the country.

III. STRONG, FAIR ENFORCEMENT ENCOURAGES AUDITING AND COMPLIANCE

The available evidence demonstrates that what actually encourages auditing is strong enforcement. As the Federal and State governments continue to vigorously enforce the environmental laws, more companies are performing audits all the time, and companies that conduct audits are expanding and improving those programs.[1]

A survey of trends in corporate environmental auditing, Price Waterhouse's *Voluntary Environmental Audit Survey of U.S. Business* (March 1995), found that 75 percent of the companies surveyed have existing auditing programs, and that ⅓ of those companies without an existing auditing program plan to develop one. And one of the primary reasons for the increase in auditing in recent years is the strength of the current environmental enforcement program, a principal component of which is the civil and criminal prosecution of environmental violations by the Department.[2] Companies perform audits and correct violations found in those audits because they know that if they do not, they may be subject to civil penalties, criminal sanctions, the cost of remediation of environmental harm, tort liability, and litigation costs. If increased environmental auditing is truly the goal, we should be fostering strong environmental enforcement, not hamstringing that enforcement by allowing companies to hide their violations and escape punishment for them.

IV. ENVIRONMENTAL AUDIT PRIVILEGES ONLY CONCEAL FROM CITIZENS AND GOVERNMENT OFFICIALS INFORMATION VITAL TO HUMAN HEALTH AND THE ENVIRONMENT

Indeed, there is little or no reason to believe that environmental audit privileges increase the amount or the quality of environmental auditing. Among the companies

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[1] *See*, Note, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time For A Compromise?,* 31 Am. Crim. L. Rev. 123 (1993), citing a 1992 Arthur D. Little, Inc. survey for Fortune 100 companies in which 80 percent of respondents stated that they planned to expand their corporate environmental auditing programs.

[2] The Arthur D. Little, Inc. study also found that, among the primary reasons for the expansion of audits, is the existence of significant penalties for non-compliance.

responding to the Price Waterhouse survey, the most important reason given by those that do not currently audit for not doing so was a belief that their products and processes have insignificant environmental impacts. A concern that audit information could be used against them for any purpose was identified by slightly fewer than one in five respondents. For those companies unwilling to expand an existing auditing program, limited company resources was the principal reason identified.

Even among companies currently performing audits, audit privileges only reduce the effectiveness of the audits that are conducted. The existence of an audit privilege diminishes the incentive to correct violations promptly, and reduces the urgency to identify violations before enforcement authorities do. With the veil of secrecy that an audit privilege provides, unscrupulous companies may believe that they are be able to conceal from both the regulators and the public both the violations themselves and the environmental harm resulting from the violations.

It is simply common sense—not to mention the empirical conclusion of enforcement and regulatory efforts generally, both in the environmental context and in such other contexts as securities and food safety regulation—that public and governmental scrutiny of corporate behavior increases the level of responsible behavior. Corporate secrecy does not. And an environmental audit privilege would allow polluters to hide their activities from the government and the public. This is true whether the privilege is created by Federal law or State law. While the States may be excellent laboratories for change in many circumstances, environmental audits is not one of those circumstances. The problems are too obvious and the risks are too great. The Federal environmental laws were established to ensure that all Americans, wherever they live, will be protected from the threats posed by pollution. The creation of environmental audit privileges jeopardizes that protection. For the same reasons, we also oppose legislative proposals that would make Federal enforcement subject to State audit privilege or disclosure immunity laws.

Moreover, aside from any direct concerns about enforcement and compliance, community residents have a right to know about environmental hazards that may pose a threat to their community. The entire system of environmental regulation is built on self-reporting and on government and public scrutiny of information relating to the handling of environmental contaminants. Citizens and government agencies use such information to make reasoned judgments regarding steps to protect human health and the environment and to fashion appropriate responses to violations. An environmental audit privilege runs directly counter to this most basic premise of the environmental regulatory system, and represents the first time that Federal environmental legislation will have acted to limit the availability of information to the public, rather than to expand it. That is not the direction that we should be taking the environmental laws.

Now, some have tried to analogize the privilege created by environmental audit legislation to the "self-test" privilege to be established by regulation under the Fair Housing and Equal Credit Opportunity Acts. The analogy does not hold. As an initial matter, as members of the Department and other prosecutors have frequently stated, any new evidentiary privilege impedes the truth-finding process so critical in enforcement of our nation's laws, and allows violations and violators to go undetected and unpunished. The Attorney General has enumerated a number of the Department's concerns in regard to audit privileges in her letter to Administrator Browner, dated April 6, 1995, which we have attached to this testimony.

When the bill creating a privilege in the lending context was being considered, the Department likewise opposed creation of a broad privilege because of the threat such a privilege would have posed to effective enforcement of the anti-discrimination laws. Indeed, in that context, the Justice Department supported only a very narrow privilege centered on matched pair testing, a technique especially suited to fair housing and fair lending issues—and one that has no real analogue in almost any other area of law, including environmental law. Matched pair testing allows a lender to gauge the inclination of its employees to violate the lending discrimination statutes without running the risk of depriving an actual applicant of a loan. Thus, matched pair testing really creates a new opportunity, which would not have existed but for the matched pair test itself, to examine whether the employees of the company performing the test are violating the law through discrimination; yet the performance of the test does not result in a bona fide borrower being denied a loan application. In contrast, the privilege that some recent State legislation creates for environmental audits shields from disclosure past and even ongoing environmental violations that can pose a real and present risk to human health and the environment. We cannot support the creation of such a privilege.

V. AN ENVIRONMENTAL AUDIT PRIVILEGE WOULD IMPAIR ENFORCEMENT AND DRIVE UP LITIGATION COSTS

The impediments that an audit privilege would create for civil and criminal enforcement are profound. As just one example, many criminal investigations begin with a tip from a company insider who is disturbed by illegal activities he or she has observed and notifies authorities, often providing written corroboration of the violations. In the face of an environmental audit privilege, an investigator may be unable to pursue that tip effectively because the investigator would not know whether the corroboration provided by the whistle blower came from an environmental audit report. Even the whistle blower might not know whether the document was originally created as part of an audit.

If the investigation proceeded despite such uncertainty and it was later determined that the corroborative document was protected under the audit privilege law, all subsequently obtained evidence could be suppressed as fruits of the privileged document, even if that evidence demonstrated criminal conduct. At the very least, important information which could corroborate the testimony of the whistle blower, whose credibility would almost inevitably be strongly attacked by the company's lawyers, would be withheld from the jury.

To prevent such a result, prosecutors will frequently be forced very early in an investigation to initiate an *in camera* proceeding before a court. Aside from taking scarce court time, such a proceeding will require notification of the company being investigated, and may thereby cutoff the investigative phase of the case prematurely. The result could very well be that the investigation will be so hobbled that charges will not be able to be pursued. Criminal activity would thus go unpunished and environmental violations unaddressed.

Even after a prosecution is initiated, litigation over audit privileges diverts scarce judicial and prosecutorial resources from quickly and efficiently concluding environmental litigation and remedying threats to human health and the environment. Time must be spent on litigating in detail, every time the privilege is invoked, whether such new and legally untested privileges apply, rather than on trying to resolve the substance of the matter as expeditiously as possible. And the disputes over the applicability of the privilege will recur throughout the litigation, always consuming more and more of the court's time. It would be a poor lawyer, indeed, who could not delay investigations or trials for weeks or months in litigating the complicated claims of privilege that inevitably arise under environmental privilege statutes. This drain on courts' resources and the associated escalation of government resources and private lawyers' fees that will have to be spent on environmental cases—not to mention the delay that will result in addressing environmental threats—simply is not in the public interest, and cannot be justified.

VI. IMMUNITY FOR SELF-DISCLOSED VIOLATIONS WOULD DIRECTLY INTERFERE WITH FAIR AND EFFECTIVE ENFORCEMENT OF THE LAW

In addition to the problems created by an audit privilege, statutory grants of immunity for voluntary disclosures like those contained in S. 866 raise additional problems. Such immunity provisions allow violators, including those engaged in criminal violations of environmental statutes, to go unpunished. In essence, such immunity for criminal violations is like allowing anyone who confesses to robbing a bank to escape prosecution, so long as the person apologizes and promises to give the money back.

Environmental crimes are real crimes, with real impacts on communities. Imagine the public outcry if, following an environmental violation that caused death, serious bodily injury, or major environmental harm, the government were prevented from prosecuting those responsible because of an immunity law. Indeed, in the wake of the Exxon Valdez disaster, Congress amended the immunity provision in the oil spill reporting requirements of the Clean Water Act to ensure that the government would not be prevented from utilizing an oil spill notification against a corporation or responsible parties other than the natural person actually providing the notice.

Providing immunity for violations voluntarily disclosed to the government frustrates legitimate enforcement efforts and discourages regulated entities from taking sufficient precautions to avoid committing violations in the first instance. Currently, the law sends a powerful message that those who are in a position to prevent or to remedy a violation must do so, or bear the consequences. An immunity provision sends a different message: it tells those same people that there is no need to take a proactive approach to environmental management because the company employing those people can immunize itself from civil and criminal penalties even after it has caused serious environmental problems. All it has to do is conduct an audit, disclose its violations, and only then, when the harm is already done, initiate action

to correct those problems. The only thing companies would make sure to do promptly in such a regime is invoke the protections of the immunity statute.

VII. CONCLUSION

The voluntary disclosure policies of the Department of Justice and EPA are a fair and balanced approach to handling audits and self-disclosure, and they are working well. They achieve the results that proponents of audit privilege and disclosure immunity legislation say they are trying to achieve, without adversely affecting environmental enforcement and compliance, or the public's right to have access to information about threats to their health and their environment. The Department therefore opposes the enactment of audit privilege or immunity legislation—at the Federal level and at the State level. Such legislation is bad for enforcement, bad for the environment, and bad for human health and the environment.

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, April 6, 1995.

Hon. CAROL M. BROWNER,
Administrator, U.S. Environmental Protection Agency, Washington, DC.

DEAR MS. BROWNER: At our meeting in December, 1994, we discussed the issues raised by proposed legislation that would create an evidentiary privilege for environmental audits, or bestow immunity on violators. We also discussed our belief in the importance of voluntary compliance to environmental protection. I appreciate EPA's significant efforts, working cooperatively with the Department, to re-examine its policies on environmental audits and voluntary disclosure, especially the work of Assistant Administrator Steve Herman and his stiff in gathering a wide range of information and views on this topic.

Having looked closely at this issue, and having heard many views, I have reached several conclusions. First, as a former prosecutor, I oppose the creation of a new evidentiary privilege, or an immunity law, be cause such legislation would reduce our ability to enforce the environmental laws that protect the public's health and safety and our precious natural resources. In a recent meeting with State and local prosecutors we discussed this topic, and I advised them of my views on this matter. I note that my objection is to the creation of a new evidentiary privilege for environmental self-evaluations. I am not addressing existing privileges, such as attorney-client and work product, to the extent that those privileges may apply to certain environmental audits. Second, I believe there are positive measures that can be undertaken to encourage voluntary compliance without resorting to a problematic statutory solution.

The legislative push for a privilege began with allegations that the government used environmental audits unfairly to punish those attempting to comply with the law. EPA's review, and a review of our own cases, have shown that allegation to be criminal cases and found no instance where a company voluntarily disclosed environmental violations discovered by an audit and was subsequently prosecuted as a result of its disclosure. What has emerged from this review is a picture of sound enforcement practices that have substantially improved environmental compliance. In fact, it appears that the effect of our joint enforcement program has been to inspire more companies to undertake audits in order to discover and correct violations.

While proponents have failed to demonstrate the need for an audit privilege, such a privilege would carry a very heavy cost. Environmental protection has improved under the environmental laws based on a system of openness and self-reporting. Yet, an evidentiary privilege statute would be tantamount to an environmental secrecy act, shielding information about environmental violations and environmental harm. Moreover, a privilege could serve to confuse the regulated community about their existing legal obligations to report violations. An audit privilege would constitute a major step away from corporate accountability. I would restrict the truth-finding process and limit our ability to seek relevant evidence on the public's behalf.

In addition, a privilege statute would mire federal enforcement efforts in a morass of litigation over the applicability and reach of the privilege and the scope of exemptions. Crucial terms in the various audit privilege statutes are broad or ill-defined, and there are no established definitions or standards for environmental audits. This would allow violators to claim the privilege for a wide range of internal activities and communications, while agents in the field would lack clear guidance on how to proceed with their investigations. At worst, environmental violations would go undetected and environmental criminals unpunished. At best, the privilege statutes would introduce new layers of litigation, including pre-indictment and pretrial motions and *in camera* hearings.

This added litigation would consume scarce judicial, prosecutorial and investigative resources, and the resulting delays would sometimes leave underlying health and environmental problems uncorrected and the public unprotected. I note that these are among the reasons why all Federal, State and local prosecutors whose views have been communicated to the Department, uniformly oppose statutes that would establish an evidentiary privilege for environmental law violators.

An environmental audit privilege would be especially susceptible to abuse. Proposed legislation cannot be analyzed solely on the model of the good environmental citizen, since that person is not likely to be an enforcement target. We must also consider environmental violators who are willing to break the law to save money, and who, as recent prosecutions have demonstrated, will lie to government officials to conceal their actions. We can expect that a privilege would be raised, often on frivolous grounds, just to interfere with the enforcement process. An audit privilege could be used to shield serious continuing violations and criminal conduct.

Proponents of an audit privilege mistakenly claim that the privilege would reduce the involvement of lawyers and thereby make audits more affordable for small businesses. To the contrary, in order to ensure that statutory privileges cover their actions, businesses would have to involve lawyers in the audit process at least as much as they already do, thus diverting funds to lawyers rather than to environmental compliance.

Some State statutes and proposed Federal legislation provide immunity under certain circumstances to those who voluntarily disclose their violations to the government. These unprecedented immunity provisions have the potential to allow serious environmental criminals and other violators to escape responsibility for their acts when, after the fact and when the harm is done, they elect to come forward and reveal their action. These immunity provisions require enforcement to focus on a single factor—self-disclosure—and ignore all the other considerations that should inform prosecutorial decisionmaking, such as the duration and seriousness of the harm.

For all these reasons, the damage to environmental protection by such laws would far outweigh any speculative gains they might accomplish.

I am convinced that we can take additional affirmative steps to encourage self-audits, self-correction and voluntary disclosures. Among the steps that the Department would support are the following:

• Expansion of EPA's program of compliance assistance and penalty mitigation for small businesses regulated by the clean Air Act to other environmental statutes. A broader compliance assistance program might be specially beneficial to small businesses, although great care must be taken in expanding an amnesty provision to regulatory programs that are far from new. If budgetary constraints limit expansion of this assistance program, the Department is willing to work with EPA to find methods of supplementing the Agency's resources.

• Modification of current EPA penalty policies to give substantial penalty mitigation for efforts at self-evaluation and self-disclosure. In particular, where a company with a comprehensive management system in place, discovered, reported and swiftly corrected the violations, and no harm to the public or the environment resulted from the violation, EPA could elect to forego the gravity component of a penalty calculation. However, no company should be able to benefit financially from breaking the law, thereby gaining an unfair competitive advantage.

• Expansion of the Environmental Leadership Program into a broad-based standardized program for environmental leaders. Such a program would recognize those companies that demonstrate truly excellent environmental management.

• Clarification of EPA's practice of not requesting audits during routine inspections, and of the Department's practice of not utilizing audits as a means of initiating cases. We should publicly adopt these practices as the Department's and EPA's policy, with the proviso that, once a civil or criminal investigation begins based on independent information of violations, it is appropriate to obtain all relevant information, including audits or other self-evaluative reports.

• Announcement of the Department's intention to view the use by organizations of effective programs to prevent and detect violations of law, as well as self-reporting, cooperation and acceptance of responsibility as mitigating factors in the sentencing phase of environmental criminal cases against corporations.

• Development of an acceptable standard definition of the term "environmental audit" and to crate a generally accepted set of standards for conducting such audits in conjunction with the efforts of private standard-setting entities.

These approaches, coupled with our shared commitment to tough yet fair enforcement against those who seek an unfair advantage by avoiding the costs of compliance, will encourage environmental compliance auditing, voluntary disclosure, and greater compliance with the environmental laws.

In conclusion, I ask you to join me in vigorously opposing Federal legislation that would create an evidentiary privilege for environmental audits or bestow immunity on violators. Working together we can take steps that will encourage compliance without weakening the enforcement of our Nation's environmental laws.

Sincerely,

JANET RENO.

PREPARED STATEMENT OF AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA AND AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES

Dear Mr. Chairman and Members of the Committee: The Airports Council International—North America (ACI–NA) and the American Association of Airport Executives (AAAE) appreciate the opportunity to submit written comments for the record of the hearing on liability from voluntary audits, held on October 30, 1997.

ACI–NA's members are the local, State and regional governmental entities that own and operate commercial service airports in the United States and Canada. ACI–NA member airports serve more than 90 percent of the U.S. domestic scheduled air passenger and cargo traffic and virtually all U.S. scheduled international travel. AAAE is the professional organization representing the men and women who manage the primary, commercial service, reliever and general aviation airports which enplane 99 percent of the passengers in the United States.

ACI–NA and AAAE appreciate your taking the initiative to provide a forum for Congress, the Administration, and industry to examine this issue. In particular, airports support passage of S. 866, the "Environmental Protection Partnership Act," introduced by your colleague, Senator Kay Bailey Hutchison. The bill would prevent certain voluntary disclosures of violations from being subject to investigatory procedure or admitted into evidence during a judicial or administrative proceeding. As part of general pollution prevention and environmental planning efforts, airports often employ self audits to ensure that all activities undertaken on airport property comply with environmental laws and regulations.

Periodic voluntary audits allow airport management to identify potential environmental problems, to evaluate current pollution prevention and control technologies, and to develop more effective methods for future use. However, airport operators have been discouraged from continuing or expanding this practice, in the face of EPA's requirement that they disclose this information as a matter of public record, subject to enforcement action and penalties.

The airport community believes that self-policing can play a crucial role in finding, correcting and preventing violations. The current EPA-imposed policy effectively penalizes airport operators who attempt to monitor their own activities and activities of their tenants in an effort to ensure environmental compliance. Ironically, the EPA's policy requiring full disclosure of self-audit ultimately creates a *disincentive* for airports to do everything possible to ensure compliance with environmental laws and regulations.

On behalf of U.S. airports, thank you for holding today's hearing on this very important issue.

PREPARED STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation (AFBF) is the largest general farm organization in the nation. AFBF has affiliated State Farm Bureaus in all 50 States and Puerto Rico, representing the interests of more than 4.7 million member families nationwide.

We are pleased to submit this statement for the hearing record on the issue of environmental audits. The debate on this issue is extremely important to farmers and ranchers, because the way that the environmental audit issue is finally resolved will go a long way toward determining how agricultural compliance with environmental laws is finally achieved.

The American Farm Bureau Federation believes that the approach taken in Senator Hutchinson's bill, S. 822, offers the most promise, and we support its passage. Senator Enzi's bill, S. 1332, which would provide Federal recognition of the protections provided in State environmental audit legislation, is also on the right track. We believe, however, that Federal legislation needs to do more than recognize State audit laws.

Farmers and ranchers bring a different perspective to this issue than that presented at the hearing. Most of the testimony at the hearing focused on environmental auditing by heavy industry or larger corporations. Farmers and ranchers fit

into neither category, yet they are subject to as many or more environmental regulations. Just trying to keep up with all the new environmental regulations that impact agriculture is a full-time job for most farm and ranch operations.

Unlike large corporations, farm and ranch operations do not have fully staffed environmental departments or divisions. Most farm and ranch operations do not have the time or manpower to conduct their own thorough environmental audits, or routinely study all of the environmental rules and regulations that are promulgated. But that does not mean that farmers and ranchers do not want to be in compliance with environmental requirements.

Farmers and ranchers depend on the land for their food, fiber and livelihoods. They have to take care of that land so it will continue to produce year after year. An appropriate program of voluntary environmental auditing would go a long way toward ensuring that farmers and ranchers are in compliance with the myriad environmental rules and regulations that now confront them.

The debate on environmental audits strikes to the core of the purpose for environmental rules and regulations. It requires an answer to these fundamental questions: Is the goal of environmental laws and regulations to have people comply with their provisions, or is it to provide a mechanism to punish those who do not? Is it the role of the Environmental Protection Agency to bring about compliance with environmental standards, or to punish those who do not? Are the general public and the environment best served by people protecting or enhancing the environment, or by punishing those who do not? Should the goal of environmental audit legislation be to assist people to comply with environmental laws and regulations, or to assist the EPA and other Federal agencies in identifying violations of environmental laws?

We believe that environmental goals can best be attained and the public better served through compliance rather than convictions. We should not forget that these statutes were enacted for the purpose of improving environmental conditions, not as penal statutes. The best way to accomplish that goal is for as many people as possible to comply with the standards set forth in those laws and regulations. We promote the goal of full compliance with applicable environmental provisions in our members' farm and ranch operations.

Distressingly, the testimony of Steven Herman of EPA at the October 30 hearing indicates that EPA views its primary mission as punishing those not in compliance with environmental laws, rather than trying to achieve compliance. The testimony evidenced a clear intent to not let violations go unpunished, even at the expense of losing potential users of the voluntary audit program. The fundamental problems with the EPA view are: (1) focus on punishment rather than compliance does not improve environmental quality; (2) there are not enough enforcement personnel to uncover and investigate all of the environmental violations; (3) to do an adequate job of enforcement will take much more money and manpower that might be better used to assist people to improve environmental quality through compliance with the many and varied environmental laws and regulations; and (4) people who understand their environmental conditions and what to do about them (as through results of an environmental audit) and who want to take proper steps are likely to be more successful in achieving the goals of environmental laws and regulations than those who are punished for noncompliance.

The current "command and control" system of environmental compliance is not working. The more enforcement role that EPA and other regulatory agencies assume, the more inadequate existing enforcement resources are.

A voluntary environmental audit policy like the one embodied in S. 822 will assist in promoting compliance with environmental rules and regulations and achieving environmental protection. Given the inadequate resources for policing environmental compliance, a system must be devised to encourage people to take steps to assess their own situations and bring their operations into compliance with environmental laws.

Most of the agricultural producers who might avail themselves of the environmental audit procedure do not intentionally violating the law. Rather, of the violations of environmental laws that producers are likely to incur, the vast majority of them are either accidental events, technical violations resulting from regulations that are too complex, or are violations about which the producer has insufficient knowledge. Environmental rules and regulations are so technical and complex that it is not difficult to be in violation of some unknown regulation. One of the primary uses of environmental audits is to determine whether an operation is in compliance or in violation in the first place.

Another primary use of environmental audits is to discover ways that violations might be corrected and ways that practices can be modified to prevent future violations. Operations that are not in compliance can be brought into compliance. The

environment is protected and enhanced, and both the producer and the public benefit.

Everyone interested in protecting and enhancing the environment should support the concept of environmental audits.

Farmers, ranchers and others would be very reluctant to conduct environmental audits if the results of an audit could be used to convict them of environmental violations. This is especially true in cases where the producer is not sure whether there is any violation, because in that situation doing an audit becomes "roll of the dice" for stakes higher than most individuals are willing to accept. While this may be attractive to larger corporations, the reduced penalties embodied in the EPA audit policy offer little or no inducement for farmers and ranchers to do environmental audits. Asking people to voluntarily take actions so that the results of those actions might be used to incriminate them in court is hardly an inducement.

But the government is not the only entity for farmers and ranchers to worry about. The Clean Air Act, the Clean Water Act, the Endangered Species Act and most other environmental statutes contain expansive "citizen suit" provisions, which allow "any person" to bring a civil action against anyone suspected of violating environmental laws. Certain entities have very aggressively used these citizen suit provisions against farmers and ranchers. Opponents of environmental audit legislation speak about the public's "right to know" information on environmental violations. Does that "right to know" mean the ability to obtain information such as an environmental audit to enable them to file citizen suits?

We believe that the approach taken in S. 822 solves this problem. The bill provides that a voluntary environmental audit report made in good faith shall not be subject to discovery in any investigative proceeding, nor shall it be admissible in any judicial or administrative proceeding. This immunity does not cover information that is required to be reported, or information that is obtained by an agency from independent sources.

The immunity does not extend to situations where (1) violations are intentional, (2) where there is a pattern of violations by the entity, (3) where disclosure is made with fraudulent intent, or (4) where any violations are not remedied in a timely manner. The bill also does not prohibit the use of injunctive relief to remedy significant environmental or human health and safety concerns that are discovered in the course of an environmental audit. By these exclusions, the bill seeks to extend its shield of protection only to those who are serious about assessing their operation and correcting any problems that might be found.

S. 822 would not protect major polluters, as its critics claim. Nor will it allow people to use the protections of S. 822 for dishonest purposes. Its narrow scope is limited to providing inducement to honest operators to voluntarily assess their own operations and take corrective action where problems are discovered. If the goal of environmental legislation is to have everyone comply with their provisions, the approach taken in S. 822 is exactly what environmental audit legislation should accomplish.

We would like to also address the issue of State environmental audit laws. We support the efforts of States to promote environmental awareness and protection within their borders by passing legislation to encourage the use of environmental audits. We also support the provisions of S. 822 and S. 1332 to federally recognize State environmental audit laws and the inducements they provide. Farm Bureau has long advocated that management at the State level is preferable to Federal legislation in most cases.

In this situation, we believe that affirmative Federal recognition of environmental audits is necessary, and that Federal legislation should go beyond the mere recognition of State laws. The heretofore heavy Federal presence in environmental matter requires Federal legislation on the issue. Federal uniformity of inducements will also resolve potential legal issues of which State law applies in cases where there may be multi-State implications. that is not to say that States should not enact environmental audit legislation to protect the environment within their borders. We just believe that the more complete approach in S. 822 will more likely resolve the issues.

PREPARED STATEMENT OF ELIZABETH GLASS GELTMAN

"HOW A FEDERAL AUDIT PRIVILEGE FURTHERS THE NEW AMERICAN ENVIRONMENTALITY"

Thank you for inviting me to testify today. A few years ago I had an opportunity to visit Disney World in Orlando, Florida. Much to my family's chagrin, I didn't tour

the magic kingdom. Instead, I toured the facility co-generation plant, recycling station and composting operations in order to view the environmental policies and practices of the Disney enterprise. Disney called their environmental program "environmentality;" and they dictated that all employees should be concerned with environmental compliance matters.

I am here today to talk to you about what I call the "New American Environmentality" and how you as senators have an opportunity to further this environmentality at no cost to taxpayers, business or our communities. To the contrary, this low cost market based mechanism of encouraging environmental auditing saves business' money, makes our communities cleaner and greener and increases government efficiency. Of course, I am talking about environmental audits and the bill you are considering making environmental audit documents privileged under certain circumstances.

As a people, Americans want environmental compliance. They want clean air, clean water and green lands. They also want less government bureaucracy in accomplishing these goals.

Corporate America, working together with State regulators and the EPA regions, has had incredible success in improving that air and water quality over the last 20 years. In many cases the air and the water are cleaner. In other cases, the air and water are no dirtier than it was 20 years ago, notwithstanding the incredible development and population increase in that time. These are successes to be proud of; but we, as a nation, need to do more.

We need to improve the New American Environmentality to improve environmental quality throughout the country. Government *cannot* do this alone. We do not have enough regulators to enforce all violations of all environmental laws. Moreover, we can not regulate all environmental matters. Many important issues, such as nonpoint source runoff and fugitive emissions, remain unregulated. We have to work together with industry and the American people to improve the quality of the American environment.

Enter environmental audits. Environmental audits are designed to identify environmental problems that can become either a liability issue or a regulatory concern. The goal of a well designed environmental audit is to check a facility and identify potential problems and correct them. Industry uses audits to keep environmental costs down as well as to avoid fines.

To date, sixteen (16) States have enacted environmental audit privilege or immunity laws. The concept of environmental audit privilege is to encourage industry to conduct audits candidly and proactively. Privilege allows regulated entities to look for problems that they are not legally required to check. If the company fixes the problem identified as problematic in the audit document, then the document itself (and not the underlying data the document discusses) will be privileged from discovery by enforcement authorities.

Note that the audit document is privileged if—and only if—the regulated entity fixes the problems identified in the audit. There is no privilege absent a correction of the environmental problems identified in the audit. Hence, contrary to some assertions by U.S. EPA and the U.S. Department of Justice respecting the privilege of an audit document, industry cannot hide evidence of negligence. If the problem is discovered in an audit and not fixed, then not only can a suit lie for common law negligence (as well as the full panoply of environmental laws), but the audit document would not be considered privileged because a critical element necessary to invoke the privilege—correcting the problem—has not been met.

Which brings me to a second argument often made by U.S. EPA and the Department of Justice: use of the audit document to prove the scienter (or knowledge) element in a criminal prosecution. U.S. EPA and the Department of Justice consistently argue that they will not routinely ask for audit documents, but reserve the right to do so to prove scienter. This is bad policy. As I have already said, the must important aspect of the privilege in most States is that it is absolutely conditioned on coming into environmental compliance.

If a company does an audit, discovers a problem and corrects it before there is any harm to the environment, then we as a society have accomplished the primary goal of environmental laws—to keep society safe. If a company does an audit after there has been an environmental disaster and tries to use the audit to deter the effort the Justice Department, then the document would not be privileged. Moreover, if there is an environmental disaster there is likely to be a lot of independent evidence of the environmental crime committed. Simply said, the audit document itself would not be the only evidence of criminal conduct.

If on the other hand, an audit is conducted and environmental disaster is averted, there may be no independent evidence of wrongdoing without discovering the audit document. But do we really want to spend valuable enforcement resources prosecuting

people who found a problem, fixed it and averted environmental disaster? Shouldn't we spend our scarce enforcement resources prosecuting those who cause harm to the environment or who rountinely thumb their noses at environmental rules and regulations? In other words, do we really want to criminally prosecute parties where there is no harm to the environment and there is no independent evidence of wrongdoing aside from the audit document—the document which led to fixing the problem? To me, the answer is clear: where environmental disaster has been averted, we should be encouraging the efforts of industry—not threatening them with criminal lawsuits. The goal is environmental compliance, not prosecution for prosecutions sake.

I like to explain this principle to my law students by analogizing to my kids. We have rules in our house and my two boys know that they are supposed to abide by all the rules in the house all of the time. Sometimes, however, they forget. Or make mistakes. The other day my sons were throwing a ball in the living room. Both boys know they weren't supposed to do so, but they were excited about the upcoming Ravens/Redskins game (we follow both teams). While "hiking" the ball, one boy accidentally knocked over a vase I had been given by a dear friend for my wedding. My younger son looked at the breakage and immediately suggested that they hide evidence of the "crime." My older son (wiser than his years) told my baby that hiding evidence of the damage was not a wise idea. He said they needed to tell me, but he was sure "Mommy would be fair." He knew it would be worse to lie by not telling me of the problem. The boys, thus, ran to me apologetically, confessed theirs "sins" and promised never to do it again. I admonished them for their errant behavior, but did not ground them for the next 20 years. Balls haven't been flying in my house since—although I expect there may be mistakes in the future.

Industry is like children. The job of U.S. EPA and the Department of Justice is that of a responsible parent. We can not possible police all industry for all environmental compliance all the time. Even the best company will have problems and make mistakes. If we punish them drastically, then they are unlikely to come forward and confess the problems and work cooperatively with the agency. Instead, they are more likely to hide the problems and let them fester until they become true environmental disasters.

Americans want environmental compliance. Environmental audit laws encourage environmental compliance by conditioning privilege on correcting problems identified in the audit. Many States have enacted audit privilege statutes to increase their environmental compliance efforts. All preliminary data indicate that environmental compliance (and beyond compliance environmental efforts) have increased in States with privilege laws. Moreover, no State has indicated that the existence of an environmental audit privilege law has interfered with the ability of the agency to prosecute environmental matters any more than the attorney client privilege hinders prosecution. Nor has the U.S. Department of Justice been able to point to any case where the existence of any environmental audit privilege or immunity law has impaired prosecution beyond the discovery dispute normally occurring in, for example, the attorney-client privilege context.

For these and many other reasons I have written on in the past, I believe the passage of a Federal environmental audit privilege law would be good for the environment, business and the public welfare. I urge you to carefully consider the legislation before you; and I thank you for your time.

Appendix A

Table of Audit Privilege Laws By Date Enacted

Date Enacted	1994 (4)	1995 (5)	1996 (6)	1997 (2)
States	Arkansas, Colorado, Idaho, Kentucky.	Illinois, Indiana, Kansas, Minnesota, Mississippi, New Jersey, Oregon, Texas, Utah, Virginia, Wyoming.	Michigan; New Hampshire; Ohio; South Carolina; South Dakota; Utah.	Idaho (Revised); Michigan (Revised).

Appendix B

Table of Audit Immunity Laws By Region

Region	States with Enacted Audit Immunity Laws (16)	States with Proposed Audit Immunity Laws (24)	States with Neither Proposed Nor Enacted Audit Immunity Laws (10)
1	New Hampshire	Maine, Massachusetts, Rhode Island	Connecticut, Vermont.
2	New Jersey	New York	
3	Virginia	Delaware, Maryland, Pennsylvania, West Virginia.	
4	Kentucky, Mississippi, South Carolina	Alabama, Florida, Georgia, North Carolina, Tennessee.	
5	Michigan, Minnesota, Ohio	None	Illinois, Indiana, Wisconsin.
6	Texas	New Mexico, Oklahoma.	
7	Kansas	Iowa, Missouri, Nebraska	Arkansas, Louisiana.
8	Colorado, South Dakota, Utah, Wyoming	Montana	North Dakota.
9	None	Arizona, California, Hawaii	Nevada.
10	Idaho	Alaska, Washington	Oregon.

Appendix C

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Environmental Democracy

Elizabeth Glass Geltman and Carey Ann Mathews*

I. INTRODUCTION

In a nation where environmental compliance and enforcement are at a crossroad,[1] states have developed innovative approaches to achieve environmental protection. Through environmental audit privilege legislation, voluntary cleanup programs,[2] and environmental management systems,[3] states have assumed increased responsibility in encouraging environmental compliance through means other than just enforcement. Although some commentators feel that "the states must be recognized as the engines of

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1. Jonathan Z. Cannon, Beyond Compliance: Making Regulatory Reform Work for You, Speech to the American Bar Association Section of Natural Resources, Energy, and Environmental Law (Oct. 3, 1996).

2. For a discussion of the development of state brownfield legislation, see Elizabeth Glass Geltman, *Recycling Land: Encouraging the Redevelopment of Contaminated Property*, 10 NAT. RESOURCES & ENV'T 3 (1996). *See generally* ELIZABETH GLASS GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS chs. 5 & 5A (1994 & Supp. 1997); ELIZABETH GLASS GELTMAN, ENVIRONMENTAL LAW & BUSINESS 61-90 (Supp. 1996).

3. *See generally* ROGENE A. BUCHHOLZ, PRINCIPLES OF ENVIRONMENTAL MANAGEMENT: THE GREENING OF BUSINESS (1993); CHRISTOPHER PLANT, GREEN BUSINESS: HOPE OR HOAX? (1991); JOSEPH P. CONTRELL & BETTY J. SELDNER, ENVIRONMENTAL DECISION MAKING FOR ENGINEERING AND BUSINESS MANAGERS (1994); THOMAS SULLIVAN, THE GREENING OF AMERICAN BUSINESS (1992). *C.f.* JOHN THOMPSON, THE ENVIRONMENTAL ENTREPRENEUR: WHERE TO FIND THE PROFIT IN SAVING THE EARTH (1992).

environmental progress, with the national government's role to catalyze, empower, and otherwise assist the states,"[4] others are wary of supporting state initiatives.[5] The issue of environmental audit privilege is a prime illustration of this discord.

The environmental audit has emerged as the buzzword of the decade.[6] An environmental audit is defined by the Environmental Protection Agency (EPA) as "[a]n independent assessment of the current status of a party's compliance with applicable environmental requirements or of a party's environmental compliance policies, practices, and controls."[7] Businesses conduct environmental audits to assess compliance with environmental laws, identify potential environmental liabilities, and evaluate the effectiveness of management systems. Successful auditing may also be used to assert the "green culture" of a company or the "green" attributes of its products.[8]

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4. Mark D. Anderson, *EPA & State Environmental Agencies: Reversing Roles*, 12 No. 3 ENVTL. COMPL. & LITIG. STRATEGY 1, 1-2 (Aug. 1996).

5. *See, e.g.*, Comments of Joan Bavaria, Coalition for Environmentally Responsible Economies (CERES), at EPA Hearings on Environmental Auditing (June 1994).

Public interest groups are resisting state efforts to enact audit privilege legislation, claiming that the privilege allows companies to "hide pollution" and restricts state enforcement. *Environmental Audits: Ohio Groups Seek Revocation by EPA of State Enforcement Power Due to Law*, DAILY ENV'T REP. (BNA) No. 20, at AA1 (Jan. 30, 1997).

6. *See* ENVIRONMENTAL PROTECTION AGENCY, BENEFITS TO INDUSTRY OF ENVIRONMENTAL AUDITING (EPA Report No. EPA-230-08-83-005). *See generally* JOSEPH L. BAST, ECO-SANITY: A COMMON SENSE GUIDE TO ENVIRONMENTALISM 185, 198-99, 238-42 (1994) (citing numerous real-world examples of corporate initiatives that benefit both the environmental and the corporate bottom line); JOSEPH P. CONTRELL & BETTY J. SELDNER, ENVIRONMENTAL DECISION MAKING FOR ENGINEERING AND BUSINESS MANAGERS 39-48 (1994); LEE HARRISON, ENVIRONMENTAL, HEALTH, AND SAFETY AUDITING HANDBOOK 15, 31 (2d ed. 1994) (concluding that the focus in environmental auditing has shifted from identifying problems, to verifying compliance status, to confirming management system effectiveness); R.K. JAIN ET AL., ENVIRONMENTAL ASSESSMENT (1993); JOEL MAKOWER, THE BUSINESS FOR SOCIAL RESPONSIBILITY, BEYOND THE BOTTOM LINE: PUTTING SOCIAL RESPONSIBILITY TO WORK FOR YOUR BUSINESS AND THE WORLD (1994).

For discussion of overseas approaches to environmental auditing, *see generally* LINDA SPREDDING, ECO-MANAGEMENT AND ECO-AUDITING (1993); ERNEST CALLENBACH ET AL., THE ELMWOOD GUIDE TO ECOLOGICAL AUDITING AND SUSTAINABLE BUSINESS (1993). *See also* LEE HARRISON, *supra*, at 157-218; *c.f.* CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS, ENVIRONMENTAL AUDITING AND THE ROLE OF THE ACCOUNTING PROFESSION (1992).

For older, more historical discussions of audits, *see generally* SIDNEY DRAGGAN ET AL., ENVIRONMENTAL MONITORING, ASSESSMENT AND MANAGEMENT: THE AGENDA FOR LONG-TERM RESEARCH AND DEVELOPMENT (1987); J. LADD GREENO ET AL., ENVIRONMENTAL AUDITING: FUNDAMENTALS AND TECHNIQUES (1985); Walter W. Heller, *Economic Growth and Environmental Quality: Collision or Coexistence?*, *in* BUSINESS AND ENVIRONMENT: TOWARD COMMON GROUND 237 (H. Jeffrey Leonard et al. eds., 1977); THE NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL MONITORING (1977); ANN C. SMITH ET AL., ENVIRONMENTAL AUDITING QUALITY MANAGEMENT (1989).

7. Environmental Protection Agency, *Terms of Environment*, <http://www.epa.gov/docs/OCEPAterms>, *reprinted in* ELIZABETH GLASS GELTMAN, ENVIRONMENTAL LAW & BUSINESS TEACHER'S MANUAL 313 (1st ed. 1996).

"Environmental audit" is defined in the EPA's Final Audit Policy, under Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." 60 Fed. Reg. 66,706, 66,710 (1995).

8. Examples of "green" advertising abound. For a general discussion of environmental marketing, *see* Paul H. Leuhr, Comment, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 U.C.L.A. J. ENVTL. L. & POL'Y 311, 312 (1992); Veronica R. Sellers,

This symposium is designed to explore the new "American Environmental Democracy." The concept of an environmental paradigm shift is discussed in four Articles in this issue: Elizabeth Glass Geltman and Andrew E. Skroback, *Environmental Activism and the Ethical Investor*; Lois J. Schiffer and Jeremy D. Heep, *Forests, Wetlands, and the Superfund: Three Examples of Environmental Protection Promoting Jobs*; Cindy A. Schipani, *Infiltration of Enterprise Theory Into Environmental Jurisprudence*; and Mark A. Stach, *The Gradual Reform of Environmental Law in the Twenty-First Century: Opportunities Within a Familiar Framework.*

Geltman and Skroback discuss the effects of the environmental ethical investor movement on corporate culture at the managerial level. Schiffer and Heep explore the connection between protecting the environment and promoting the economy, noting that environmental protection and a sound economy can go hand-in-hand. Professor Schipani highlights the surreptitious introduction of enterprise liability into the CERCLA arena, focusing on the interpretation courts are giving to the statutory definition of liable parties under CERCLA to hold parent corporations liable for the environmental violations of their subsidiaries. Stach focuses on the need for businesses to become proactive in the reform of environmental regulations. Although he finds that the evolution of environmental law has historically been slow and gradual, he predicts that new opportunities will be available for those businesses that are willing to engage in a joint process of reform with environmental regulators.

International environmental issues facing the corporation, and in particular the relationships created by treaties for the transportation of industrial waste, are discussed by James T. O'Reilly and Lorre Barbara Cuzze in *Trash or Treasure? Industrial Recycling and International Barriers to the Movement of Hazardous Wastes.* O'Reilly and Cuzze conclude that pollution prevention efforts will be maximized by an international harmonization of environmental preservation systems.

The environmental audit itself is discussed in great detail in the international context by Robert Anthony Reiley in *The New Paradigm: ISO 14000 and Its Place in Regulatory Reform.* Reiley focuses on how the old command-and-control approach to environmental problems, which sought to fix problems after the problems occurred, is being replaced by a new paradigm that focuses on prevention through the use of environmental audits. Reiley predicts that the new paradigm will be more efficient and cost-effective than the old.

Practical advice on how to use information gathered in environmental audits is conveyed in two additional papers: Debra Baker and Bill Cason, *Getting Busy: Corporate Issues in the Early Stages of Criminal Environmental Investigations*; and Eva M. Fromm, Edward C. Lewis, and Heather M. Corken, *Allocating Environmental Liabilities in Acquisitions.* The first Article explains how to keep environmental problems on the civil side of enforcement. The second Article focuses on how to use information gathered in the environmental audit to quantify environmental risk in real estate transactions, suggesting the creation of standard contract provisions.

Comment, *Government Regulation of Environmental Marketing Claims*, 41 KAN. L. REV. 431, 432 (1992). *See also* ELIZABETH GLASS GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS 443-536 (1994 and Supp. 1997).

Finally, Professor Philip Weinberg also explores the changing role of environmental audits in his Article entitled, *If It Ain't Broke . . . : We Don't Need Another Privileges & Immunities Clause for Environmental Audits*. He finds that environmental audit privilege legislation poses a threat to the enforcement of laws safeguarding our air, water, and land. Professor Weinberg concludes that the EPA's policies strike the proper balance between encouraging audits and protecting the information they uncover. The remainder of this introduction focuses on the same issue, but ultimately reaches the opposite conclusion, finding that the EPA policies are insufficient to protect the needs of small businesses that cannot afford to invoke the traditional doctrines of attorney-client privilege and work product.

II. How Audit Legislation Levels the Playing Field

Environmental audits illustrate an emerging "environmentality" as states, businesses, and industries strive for improved environmental performance and compliance with environmental laws through a combination of enforcement and self-regulation.[9] Government and business both recognize that, although strict compliance with all environmental laws is required, in practice this level of compliance is difficult, if not impossible, to attain. Moreover, it is impossible for regulators to enforce. For this reason, both business and government have emphasized the need for business to engage in increased self-policing.[10] Government and business are also aware, however, that increased self-policing increases vulnerability to lawsuits. Information gathered during an audit, which is information often otherwise unavailable to either government or business, might be used against a business in an enforcement proceeding.[11] Consequently, business is currently engaged in a desperate struggle to attain an appropriate balance between the need to engage in environmental self-policing activities to correct problems and the economic risk of otherwise unlikely lawsuits. Evidentiary privileges often lay these fears to rest.

Large industry has historically relied on the common law attorney-client privilege,[12] work-product doctrine,[13] or critical self-evaluation theory[14] to argue that audit

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9. *See generally* 1 Elizabeth Glass Geltman, Securities Disclosure of Contingent Environmental Liabilities 375-425 (1995) (discussing environmental audits and the due diligence imperative of large SEC reporting companies).

10. *Id.* at 237-374 (discussing the environmental audit and report card concept developed by the EPA, Self Regulatory Organizations (SROs), and certain trade groups).

11. John Davidson, *Privileges for Environmental Audits: Is Mum Really the Word?*, 4 S.C. Envtl. L.J. 111, 112 (1995) (discussing the advantages and disadvantages of self-auditing); Michael H. Levin et al., *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, 24 Env't Rep. (BNA) 1606, 1606 (Jan. 7, 1994) (discussing the risks of voluntary environmental audits).

12. *See, e.g.*, Olen Properties Corp. v. Sheldahl, Inc., No. CV 91-6446-WDK, 1994 U.S. Dist. LEXIS 7125, at *1-2 (C.D. Cal. Apr. 12, 1994) (discussing the attorney-client privilege as developed at common law); Koppers Co. v. Aetna Cas. & Sur. Co., 847 F. Supp. 360, 362-63 (W.D. Pa. 1994); United States v. Chevron, No. 88-6681, 1989 U.S. Dist. LEXIS 12267 at *15-17 (E.D. Pa. Oct. 16, 1989).

13. *See, e.g.*, Continental Ill. Nat'l Bank & Tr. Co. v. Indemnity Ins. Co. of N. Am., No. 87-C8439, 1989 U.S. Dist. LEXIS 13004, at *3 (N.D. Ill. Oct. 30, 1989) (stating that the U.S. Department of Commerce Economic Development Administration (EDA or the government) "refused to disclose documents allegedly protected from discovery by the governmental deliberative process privilege, the attorney-client privilege and the work product privilege"). *See also Olen Properties*, 1994 U.S. Dist. LEXIS 7125, at *2-3 (considering

documentation is privileged.[15] The ultimate success of these techniques is often less important to large industry than the fact that they can legitimately claim a privilege.[16]

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whether notes taken by an environmental consultant were privileged under the work product doctrine).

14. *See, e.g.*, Reichhold Chems., Inc. v. Textron, 157 F.R.D. 522, 524 (N.D. Fla. 1994) (discussing the rationale of the critical self-evaluation theory as avoiding the chilling effect of using compliance documentation against the party complying with the regulation); *But see* Koppers Co. v. Aetna Cas. & Sur. Co., 847 F. Supp. 360, 364 (W.D. Pa. 1994) (holding the critical self-analysis theory inapplicable and noting the theory is rarely recognized); United States v. Dexter Corp., 132 F.R.D. 8, 9 (D. Conn. 1990) (holding the self-evaluation privilege inapplicable where the government brings an action under the Clean Water Act); State v. CECOS Int'l, Inc., 583 N.E.2d 1118, 1119-20 (Ohio Ct. App. 1990) (declining to find the privilege of self-evaluation applicable).

The seminal statement of the "self-critical" privilege was made in a suit for medical malpractice. Bredice v. Doctor's Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970). The *Bredice* court held that, absent evidence of extraordinary circumstances, a hospital has a qualified privilege to retain the minutes and reports of medical staff meetings during which doctors critically analyzed the hospital's medical care. *Id.* at 250-51. The court recognized the privilege based on the proposition that "the public interest may be a reason for not permitting inquiry into particular matters by discovery." *Id.* (quoting 4 JAMES MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.22(2) (2d ed. 1969)). Considering that a lack of confidentiality would destroy the "constructive professional criticism" that is "essential to the continued improvement in the care and treatment of patients," the court concluded that "there is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Id.*

The "self-critical" privilege has also been recognized in a variety of actions in which confidentiality is "essential to the free flow of information and . . . the free flow of information is essential to promote recognized public interests." Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1087 (1983). *See, e.g.*, Richards v. Maine Cent. R.R., 21 F.R.D. 590, 591-92 (D. Me. 1957) (recognizing a self-evaluative privilege to railroad company's investigation of an accident in light of the public's stake in the improvement of railroad safety); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 217 (D. Mass. 1980) (discussing how disclosure of self-critical documents regarding corporation personnel policy would have a "chilling effect" on an employer's voluntary compliance with equal employment opportunity laws).

The self-critical analysis privilege has been extended to include: a defense contractor's confidential assessment of its equal employment opportunity practices (Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971)); accounting records (New York Stock Exch. v. Sloan, 22 Fed. R. Serv. 2d (CBC) 500 (S.D.N.Y. 1980)); securities law audits (*In re* Crazy Eddie Sec. Litig., 792 F. Supp. 197, 205-06.(E.D.N.Y. 1992)); academic peer reviews (Keyes v. Lenoir Rhyne College, 552 F.2d 579, 580-81 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977)); railroad accident investigations (Granger v. National R.R. Pass. Corp., 116 F.R.D. 507, 510 (E.D. Pa. 1987)); product safety assessments (Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977)); and products liability (Bradley v. Melroe Co., 141 F.R.D. 1, 3 (D.D.C. 1992)).

Some courts have "refused its application where . . . the documents in question have been sought by a governmental agency." Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980); *see also* Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); United States v. Noall, 587 F.2d 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978).

15. *See generally* Christina Austin, Comment, *State Environmental Audit Privilege Laws: Can EPA Still Access Environmental Audits in Federal Court?*, 26 ENVTL. L. 1241, 1250-54 (1996) (discussing environmental audits in light of current common law privileges); David Sorenson, Comment, *The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483, 490-92 (1996) (discussing judicial and statutory support for environmental audit document privileges); Davidson, *supra* note 11, at 116-23 (discussing the importance of ensuring the confidentiality of environmental audits).

16. For forms advocating the inclusion of privilege language on audit documents *see, e.g.*, 1 ELIZABETH GLASS GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS 191, 196, 217 (1994 & Supp. 1997). *See generally* ELIZABETH GLASS GELTMAN, A COMPLETE GUIDE TO ENVIRONMENTAL AUDITS (1997).

The mere claim will provoke a discovery dispute, resulting in an in camera review by a judge who will determine whether "fairness" allows the government to use the audit document against the regulated business (that generated the document in an effort to comply).[17]

Small businesses, by contrast, do not have the luxury of involving counsel in audits to preserve the confidentiality of the audit documents.[18] States have realized that businesses—especially small to medium-sized businesses—need specific assurance that efforts to comply with environmental laws through self-audits will not automatically be used by the government against them. In response, over thirty states have considered legislation involving environmental audit privilege, with nineteen states enacting such legislation into law.[19] These state efforts essentially codified the discovery dispute procedures large businesses have always enjoyed. In so doing, the privilege is extended to include small and medium-sized businesses. By eliminating the requirement of hiring an attorney, small businesses can afford to engage in the same type of audit process that most large businesses currently undertake.

This Article examines the conflict surrounding state efforts to create an environmental audit privilege. The development of state audit privilege legislation is first examined. The Article then reviews the EPA's approach to environmental audits and evaluates the EPA's reasons for not supporting state privilege legislation. This Article takes issue with the conclusions of Professor Weinberg and instead concludes that the concerns of the EPA could be cured through good legislative drafting with the resulting federal environmental audit privilege law meeting the needs of small, medium, and large businesses, regulatory agencies, and the public.

III. STATE EFFORTS TO CREATE AN ENVIRONMENTAL AUDIT PRIVILEGE

As the popularity of environmental audits took hold in the late 1980s and early 1990s, businesses sought to protect audit findings by asserting common law evidentiary privileges. Skillful lawyers set forth the information as privileged because of its nature (work-product),[20] context (attorney-client communication),[21] or content (critical self-

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17. United States v. Chevron, No. 88-6681, 1989 U.S. Dist. LEXIS 12267, at *12-13 (E.D. Pa. Oct. 16, 1989).

18. *See* Kirk F. Marty, Note, *Moving Beyond the Body Count and Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495, 500, 506-09 (1995).

19. The following states have enacted audit privilege legislation: Arkansas, ARK. CODE ANN. § 8-1-301 (Michie 1996); Colorado, COLO. REV. STAT. §§ 13-25-126.5(3), 13-90-107(j), 25-1-114.5 (1996); Idaho, IDAHO CODE § 9-801 (1996); Illinois, 205 ILL. COMP. STAT. 5/52.2 (West 1996); Indiana, IND. CODE ANN. § 13-10-3 (Michie 1996); Kansas, KAN. STAT. ANN. § 60-3332 (1995); Kentucky, KY. REV. STAT. ANN. § 224.01-040 (Michie 1996); Michigan, 1996 Mich. Pub. Acts 132; Minnesota, MINN. STAT. § 115.074 (1996); Mississippi, MISS. CODE ANN. § 49-2-51 (1996); New Hampshire, 1996 N.H. Laws 4; Ohio, 1996 Ohio Laws 257; Oregon, OR. REV. STAT. § 468.963 (1993); South Carolina, 1996 S.C. Acts 384; South Dakota, S.D. CODIFIED LAWS § 1-40-33 to 37 (Michie 1996); Texas, TEX. REV. CIV. STAT. ANN. art. 4447cc-1 (West 1996); Utah, UTAH CODE ANN. § 19-7-101 (1995); Virginia, VA. CODE ANN. § 10.1-1193 (Michie 1996); Wyoming, WYO. STAT. ANN. § 144.765 (Michie 1996). In states that do not have privilege legislation, such as Florida, Tennessee, and California, state environmental agencies have modeled policies after the EPA policy. *See generally Few Companies Seen Invoking, Needing Privilege*, BNA CHEM. REG. DAILY, Feb. 20, 1997.

20. The work-product doctrine protects documents that are prepared for use in anticipated or ongoing

evaluation).[22] But these techniques are expensive. Only large corporations could take advantage of these traditional protective devices. Small and medium-sized businesses soon realized that the common law privileges did not guarantee protection against disclosure, largely because they were economically unavailable. Accordingly, they turned to state legislatures for assistance.

The states recognized the inadequacies of the common law privileges in the environmental audit context, but also discovered that the common law privileges lacked requirements to immediately clean up, correct, or disclose the discovered environmental problems. To better protect the environment by encouraging businesses to conduct environmental audits, states began the arduous process of drafting privilege legislation. Oregon was the first state to pass its audit privilege legislation in 1993.[23] Since then, over thirty other states have followed Oregon's example by proposing legislation, with nineteen of those states enacting privilege legislation into law.[24]

Although state privilege legislation is not uniform, most states promote improved compliance through a qualified privilege for information resulting from an environmental audit. In no state is the privilege absolute; indeed, businesses must follow specific steps to invoke the privilege. Under most statutes, the privilege protects documents prepared as a result of an environmental audit.[25] Although the documentation is protected from disclosure, the statutes specifically require businesses to report all violations discovered during the audit.[26] No privilege is allowed if the problem is not promptly corrected. In addition, the privilege may be lost through waiver, through an effort by the business to use the documentation as evidence, or when disclosure to another party

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litigation. FED. R. CIV. P. 26(b)(3); *see* Olen Properties Corp. V. Sheldahl, Inc., No. CV91-6446-WDK, 1994 U.S. Dist. LEXIS 7125, at *2-3 (C.D. Cal. Apr. 12, 1994).

21. The attorney-client privilege applies "where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence, are at instance permanently protected from disclosure by himself or the legal advisor, except the protection may be waived." 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton Rev. 1961); *see Olen Properties*, 1994 U.S. Dist. LEXIS 7125, at *2-3; Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 212 (D.C. Cir. 1980).

22. The self-critical analysis privilege applies where the following requirements are met:

> first, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of a type whose flow would be curtailed if discovery was allowed.

Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992) (quoting Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983)); *see* Reichhold Chems. Inc. v. Textron, Inc., 157 F.R.D. 522, 524-27 (N.D. Fla. 1994) (recognizing the validity of the self-evaluation privilege for environmental audits); Koppers Co., Inc. v. Aetna Cas. & Sur. Co., 847 F. Supp. 360, 364 (W.D. Pa. 1994) (rejecting the self-evaluation privilege for corporate environmental reports); State v. CECOS Int'l, Inc., 583 N.E.2d 1118, 1121 (Ohio Ct. App. 1990) (holding the self-evaluative privilege for an environmental audit unavailable); United States v. Dexter Corp., 132 F.R.D. 8, 10 (D. Conn. 1990) (denying the self-critical evaluation privilege).

23. OR. REV. STAT. § 468.963.

24. See *supra* note 19 for a complete list of states that have enacted audit privilege legislation.

25. *See generally* ARK. CODE ANN. § 8-1-303(b)-305 (Michie 1996); 205 ILL. COMP. STAT. 5/52.2(a) (West 1994); 1996 N.H. Laws 4 ch. 147-E:1(V); IND. CODE ANN. § 13-10-3-1; 1996 Mich. Pub. Acts 132 § 14802(3).

26. *See generally* 205 ILL. COMP. STAT. 5/52.2(a), (h); WYO. STAT. ANN. § 35-11-1106 (Michie 1996).

occurs.[27] After an in camera review, a judge can compel disclosure of the audit document when the court finds that the privilege is asserted for a fraudulent purpose, when the material is not protected by the privilege (perhaps because other state or federal laws require disclosure), or when the business does not immediately undertake corrective action.[28]

Some state statutes also provide limited immunity against penalties or testimonial privileges[29] that restrict examinations of parties involved in the audit.[30] To obtain immunity, many states set forth strict guidelines. For example, Kansas provides a rebuttable presumption of immunity only if disclosure of a violation is:

> (1) [m]ade promptly after knowledge of the information disclosed is obtained by the person or entity;
> (2) made to an agency having regulatory authority with regard to the violation disclosed;
> (3) arising out of an audit;
> (4) for which the person or entity making the disclosure initiates action in a diligent manner to resolve the violations identified in the disclosure; and
> (5) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation of the issues identified in the disclosure.[31]

Under most laws, the presumption of immunity is rebutted by establishing that the disclosure was involuntary, the violation was intentional, corrective action was not pursued diligently, or the violation resulted in significant harm to the environment or threatened the public.[32] For purposes of attaining the privilege and limited immunity, all disclosures required under state or federal law are considered involuntary disclosures.

IV. EPA AND SELF-AUDITING, PRIVILEGE, AND ENFORCEMENT

Despite assurances provided in state audit privilege legislation, businesses continue to encourage federal legislation concerning self-audits and the information revealed by these audits. As the EPA began to adopt the multi-media enforcement approach,[33] busi-

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27. *See generally* ARK. CODE ANN. § 8-1-304(a) (Michie 1996), IND. STAT. ANN. § 13-10-3-9 (Michie 1996); 1996 Mich. Pub. Acts 132 § 14803; 1996 N.H. Laws 4 ch. 147-E:4.

28. *See generally* ARK. CODE ANN. § 8-1-308-307 (Michie 1996); 205 ILL. COMP. STAT. 5/52.2(d)(2).

29. The testimonial privilege is limited to questions relating directly to the audit findings. The privilege extends to owners, operators, or employees directly involved with the audit and consultants hired to perform the audit. *See generally* KAN. STAT. ANN. § 60-3338 (1995); 1996 Mich. Pub. Acts 132 § 14802(4); UTAH CODE ANN. § 19-7-107 (1995). In some states, the court may order the claimant of the privilege to testify. *See, e.g.*, UTAH CODE ANN. § 19-7-107 (1995).

30. *See generally* KAN. STAT. ANN. § 60-3338 (1995); 1996 Mich. Pub. Acts 132 § 14809(1)-(6).

31. KAN. STAT. ANN. § 60-3332(a)(1)-(5) (1995). Many statutes limit the immunity if a pattern of serious violations is apparent.

32. *See generally id.* at § 60-3338.

33. *See Goldman Sees No Effect of Minimizing Benefits Consideration*, PESTICIDE & TOXIC CHEM. NEWS, February 2, 1994, *available in* LEXIS, News Library, ARCNWS File (wherein several "hallmarks" of EPA's enforcement initiatives were identified, including: "strategic targeting" directed at certain geographic areas and economic sectors; "multi-media enforcement;" "the whole facility approach" (through the Office of

nesses and many state attorney generals questioned the EPA about its policy toward environmental audits in the enforcement process.[34] "Businesses are afraid of doing environmental audits for fear they will be hurt by audits by uncovering damaging information that we will use against them."[35]

Although it does not support a federal audit privilege, the EPA has actively encouraged and participated in the development of environmental auditing and improved environmental management practices since 1986, when the EPA initially articulated its position on auditing.[36] The 1986 Policy served as the foundation to define the practice and profession of environmental auditing. In the 1986 Policy, the EPA encouraged "all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance."[37] The 1986 Policy encouraged structuring programs to quickly recognize environmental problems and rapidly develop a plan for corrective measures.[38] Finally, the 1986 Policy stated that the EPA would assist federal agencies in designing and implementing audit programs.[39]

In the following decade, the EPA built on this foundation, most recently supplementing it with its 1996 Final Audit Policy.[40] Although the EPA does not as a matter of policy routinely solicit environmental audits,[41] it has consistently retained the right to do so in circumstances where such action is appropriate. Most significantly, the EPA continues to seek audit documents to prove criminal scienter on the part of corporations. The Final Audit Policy is limited in its use at settlement proceedings. The mitigation it offers is unavailable if settlement fails and the case proceeds to trial.[42]

The EPA sought to resolve concerns of businesses through the issuance of its Final Audit Policy, which became effective on January 22, 1996.[43] The EPA attempted to provide safeguards to businesses while assuring that the public and the environment would remain protected. The Final Audit Policy states that prompt disclosure and correction of violations discovered during an audit or as a result of due diligence may be rewarded by the EPA's choice to waive gravity-based penalties and recommendations of

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Multimedia in the Office of Regulatory Enforcement); requiring violators to complete supplemental environmental projects instead of paying fines, with the projects sometimes costing more than the fines; and "environmental audits").

34. *State Attorneys Quiz Browner On Audits, Federal Facilities, and Criminal Investigations*, BNA CHEM. REG. DAILY, Mar. 30, 1994, at d5.

35. *Id.* (quoting Lee Fisher, former Ohio Attorney General, in a comment to EPA administrator Carol Browner).

36. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986) [hereinafter 1986 Policy].

37. *Id.* at 25,008.

38. *Id.*

39. *Id.*

40. Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 60 Fed. Reg. 66,706 (1995) [hereinafter Final Audit Policy].

41. The 1986 Policy warned that routine requests could "inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted." Environmental Auditing Policy Statement, 51 Fed. Reg. at 25,007.

42. OFFICE OF REGULATORY ENFORCEMENT, U.S. EPA, AUDIT POLICY INTERPRETIVE GUIDANCE 12 (1997), *available at* <http://es.inel.gov/OECA>.

43. 60 Fed. Reg. 66,706 (1995).

criminal prosecution so long as certain requirements are met.[44] For violations that are discovered, disclosed, and corrected other than in the course of an audit, the EPA will still consider a reduction in gravity-based penalties.[45]

The Final Audit Policy sets forth the following nine requirements that businesses must fulfill to qualify for mitigation:

1. systematic discovery through audit or other due diligence;
2. voluntary discovery;
3. prompt disclosure in writing to the EPA within 10 days of discovery;
4. independent discovery and disclosure; not in anticipation of enforcement or complaint, pending agency inspection, enforcement action, or third-party complaint;
5. correction and remediation within 60 days;
6. written agreement to prevent recurrence;
7. no repeat violations or pattern of violations;
8. no serious actual harm results; [and]
9. the entity fully cooperates with the EPA.[46]

An entity that meets all nine factors is eligible for a complete waiver of gravity-based penalties and the assurance that the EPA will not recommend that the Department of Justice (DOJ) prosecute the matter.[47] It is noteworthy that this policy is not limited to audits. If a company does not discover the violation through an audit or is unable to document due diligence, the company may still be eligible for mitigation.[48]

Despite the mitigation incentive included in the EPA's final policy, the current position of the EPA and the DOJ is that audit results are not privileged information and can be used against a company in a civil or criminal enforcement action.[49] The voluntary disclosure of self-audits, in some cases, could serve as a mitigating factor to ensure that a case is handled as a civil, rather than a criminal, matter. The EPA has stated that "[a] violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources."[50] However, in practice, the reverse is more likely to occur. The DOJ can use the audit as the sole means to prove scienter—elevating a civil matter to a criminal case.

In fashioning enforcement responses to violations, the EPA also takes into account the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. This administrative evaluation is done on a case-by-case basis. When regulated entities take reasonable precautions to avoid non-

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44. *Id.*
45. *Id.* at 66,707.
46. *Id.* at 66,708-66,710.
47. *Id.* at 66,707.
48. 60 Fed. Reg. at 66,707.
49. *Id.* at 66,710.
50. *Use of Supplemental Projects Grow; Multimedia Enforcement Link Under Review*, BNA NAT'L ENVTL. DAILY, Mar. 1, 1994, at D-10 (statement of Ira Feldman, former senior attorney in the EPA Office of Enforcement, quoting from a Jan. 12 memo from Earl Devaney, director of the EPA's office of criminal enforcement).

compliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, the EPA *may* exercise its discretion to consider whether such actions reflect honest and genuine efforts to assure compliance. Such consideration particularly applies when a regulated entity promptly reports violations or compliance data that otherwise were not required to be recorded or reported to the EPA. This promise is in large part illusory because, for purposes of realizing lenient treatment, a report is *not considered voluntary* if it is made pursuant to a permit, consent decree, statute, or regulation.

The EPA's Final Audit and Self-Disclosure Policy has been in effect for over one year. Although incentives under the policy are extremely limited, the EPA reports that the policy had a "substantial impact."[51] The EPA's data shows that during the past year, over 350 facilities with violations were reported by 105 companies.[52] True to the policy provisions, the EPA resolved the issues with forty-eight facilities and forty companies and elected to waive the penalties in most instances.[53] Although the statistics may appear impressive overall, fifty companies made disclosures within the first three months of the policy, accounting for thirteen of the final settlements.[54] Twelve of these settlements involved waivers of penalties and one contained a reduced penalty.[55] During the final nine months, therefore, only fifty-five more companies made disclosures.

Of the initial thirteen settled cases, twelve involved paperwork violations and one involved improper storage and use of polychlorinated biphenols (PCBs). In one case, the paperwork violation involved a failure to file Toxic Release Inventory reports that are required under the Emergency Planning and Community Right to Know Act (EPCRA), for which the company faced a $60,797 fine.[56] The EPA decreased the penalty to $5,000 and required the company to perform two supplemental environmental projects (SEPs). The estimated cost of the SEPs was not disclosed.[57] The eleven remaining paperwork cases involved violations of the Resource Conservation and Recovery Act's (RCRA) manifest system.

The EPA offers such statistics to illustrate the success of the Final Policy; however, the Final Policy still contains many drawbacks that cannot be ignored. The Final Policy fails to create "any rights, duties, obligations, or defenses."[58] The EPA main-

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51. EPA Press Advisory, EPA 97-R-9, Jan. 17, 1997, *available at* 1997 WL 16810, at *2.

52. *Id.*

53. *Id.*

54. G. Van Velsor Wolf, Jr., *The Impact of Environmental Law on Real Estate and Other Commercial Transactions: Self-Audit Privilege and Disclosure*, SB18 ALI-ABA 537, 547 (Oct. 10, 1996). The EPA waived penalties against Austin Sculpture, Pharr, Texas; Auto Trim, Inc., Brownsville, Texas; Bortec Industrial, El Paso, Texas; Gobar Systems, Brownsville, Texas; Invacare, McAllen, Texas; Lambda Electronics, McAllen, Texas; Magnatek, Brownsville, Texas; Midwestern Machinery, Minneapolis, Minnesota; Norton Company, Stevensville, Texas; TRW Vehicle Safety Systems, McAllen, Texas; TRW Automotive Product Remanufacturers, McAllen, Texas; Teccor Electronics, Brownsville, Texas; and Thomson Saginaw Ball Screw, Saginaw, Michigan. OFFICE OF REGULATORY ENFORCEMENT, U.S. EPA, AUDIT POLICY INTERPRETIVE GUIDANCE (1997), *available at* <http://es.inel.gov/OECA>.

55. *See* Wolf, *supra* note 54, at 547.

56. *Id.*

57. In some cases, performance of an SEP can cost a company more than the reduction in penalty. *Forced Volunteerism: The New Regulatory Push to Prevent Pollution*, CHEM. REG. REP. (BNA), January 22, 1993, *available in* Westlaw 16 Chem 1996, BNA/ENV database.

58. *See generally* Roger D. Wynne & Scott R. Vokey, *EPA's Final Environmental Audit Policy—Penalty*

tains discretion in reviewing disclosures under the policy guidelines. Although benefits are offered to encourage disclosure, violators are uncertain whether they will receive them.[59] The rigorous requirements to cooperate fully with the EPA and remediate within sixty days to be eligible for a penalty waiver may discourage disclosure. The alternative, mitigation of a penalty if eight of nine requirements are met, may be insufficient compensation to encourage disclosure. Not only are companies aware that they might not receive a break in the penalty assessment, but the information provided could be used against them in other actions, such as third-party suits.[60] Because of the perceived inadequacies of the Final Audit Policy, businesses continue to press for a federal audit privilege. The EPA maintains its opposition to such a law, pointing to six reasons included in the Final Audit Policy. First, the EPA fears that a privilege promotes secrecy and fails to foster the public's trust in industry.[61] Second, the EPA asserts that a federal privilege is unnecessary because environmental audits have increased in popularity without one.[62] Additionally, the EPA points to the agency's rare use of audits.[63] Third, the EPA believes that businesses would mark documents "AUDIT" improperly and excessively.[64] Fourth, a federal audit privilege would lead to costly litigation.[65] Fifth, the Final Audit Policy removes any need for a privilege.[66] Finally, public interest groups and prosecutors oppose the privilege.[67]

Each reason put forward by the EPA, however, may be countered by common sense and keen legislative drafting. The EPA asserts that a privilege invites secrecy and discourages openness, a claim that is echoed by many prosecutors, environmentalists, and public interest groups. This statement overlooks what most state statutes require as a first step toward receiving the privilege: disclosure of the violation. The good actor that discovers a violation must immediately disclose the discovery and make necessary repairs to qualify for the privilege. There is no secret that a violation occurred. All that is protected are documents generated by the company during the environmental audit.

The EPA next reasons that there is no need for a privilege because audits are growing in popularity without a privilege and the EPA rarely uses audits for investigations. Although it is true that audits are growing in popularity among large companies even in the absence of a federal privilege, the EPA fails to recognize that smaller businesses still need an incentive to audit. Large companies can more easily afford audits, cleanup costs, and penalties because they can afford to employ a lawyer to use traditional notions of privilege to safeguard the audit. Small businesses, however, are not as economically able to use traditional privilege mechanisms. To level the playing field between large and small businesses, an environmental audit privilege statute is impera-

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Reductions But Not "Privileges," REAL EST./ENVTL. LIABILITY NEWS, Feb. 5, 1996.

59. Adam Schultz, *EPA Cordially Invites You to . . . Turn Yourself In*, PIT & QUARRY, May 1996, at 30.

60. Wolf, *supra* note 54, at 546.

61. 60 Fed. Reg. 66,706, 66,710 (1995).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 60 Fed. Reg. at 66,710.

67. *Id.*

tive. Small businesses will never enjoy the same evidentiary privileges large companies already enjoy without such federal legislation.

To support its stance that a privilege is unnecessary, the EPA cites a 1995 study by Price Waterhouse, which "found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions."[68] The Price Waterhouse survey targeted industry sectors with more than 100 employees and whose annual sales exceeded $10 million.[69] Of the companies surveyed, 24.7% performed no environmental audits. When asked to check all boxes that explained why they performed no audits, 51.6% did not perceive a need to audit, 42.9% felt their processes and products had little impact on the environment, 20.9% believed environmental audits were too expensive, and 19.8% expressed concern that information would be used against the company.[70] These statistics bring the EPA's broad interpretation into perspective. The survey also found, however, that 45% of the companies that do conduct environmental audits were hesitant to expand their auditing program because they feared that their self-policing would be used against them in citizen suits and enforcement actions.[71] Forty-nine percent of the companies surveyed stated that to encourage increased auditing, a federal audit privilege law was necessary, and 42% desired state audit privilege laws.[72] An overwhelming 80.5% stated that there were reasons to protect or hold confidential compliance audit findings.[73] The EPA did not disclose such results in its Final Audit Policy.

The EPA's third fear, that "environmental audit-privileged" would be stamped on every document related to a violation, presents a worst case scenario that is easily corrected through the provision of an in camera review. Most businesses already label documents "attorney-client privilege" and "work-product doctrine."[74] Many state statutes limit the use of the "audit" stamp, setting forth what documents are eligible to receive the privilege. Federal legislation could carefully set parameters so the privilege is not abused.

Auditing documents will always be the subject of costly discovery litigation—whether or not an audit privilege exists. The only question is how the document is labeled: "privileged under attorney-client and work-product" or "privileged under environmental audit." In either case, an in camera review will be required. By designing

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68. *Id.*

69. PRICE WATERHOUSE L.L.P., VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS 12 (1995) [hereinafter PRICE WATERHOUSE SURVEY] (stating that the annual sales of nearly 75% of the firms included in the survey, however, exceeded $50 million).

70. *Id.* at 4 (survey section). The survey then asked the participants to circle the response that represented their primary reason for not conducting audits. The companies most frequently circled "processes and products had insignificant environmental impacts." *Id.*

71. *Id.* at 28.

72. *Id.*

73. *Id.* at 6 (survey section).

74. Checking all applicable answers in question 69 of the Price Waterhouse Survey, 42.9% consider the audit information privileged under the attorney-client privilege or work-product doctrine. Twenty-eight percent consider the audit information protected by a self-evaluative privilege. PRICE WATERHOUSE SURVEY, *supra* note 69, at 16 (survey section).

clear guidelines for what the privilege does or does not cover, the EPA's fourth concern, costly litigation, may actually be reduced if the current ambiguous standard of traditional privileges is replaced. Moreover, the small businesses that will now be encouraged to audit historically have not been targets of the EPA's scrutiny. Auditing brings more businesses into the compliance net, not the reverse.

The EPA further asserts that the Final Audit Policy is all the incentive needed, and therefore a federal privilege is unnecessary. Based on the constant requests by businesses and industries for a federal privilege, it is evident that the policy did not do away with the need for a privilege. The EPA's "highly punitive attitude undoubtedly also makes industry very, very cautious about making voluntary disclosures."[75] Additionally, small businesses need more than paper promises that their auditing efforts will not result in punitive measures.

Two weeks after the Final Policy went into effect, the Administrator of the EPA stated that the EPA was willing to cooperate with states in their development of model legislation to encourage environmental auditing.[76] "We would be more than happy to look at model legislation and to work with states."[77] In the year since the Final Audit Policy took effect, however, the partnership between the EPA and the states has become threatened. A state which has been delegated authority to oversee environmental permit programs is obligated to prosecute civil and criminal violations of federal law. The EPA asserts that states with delegated authority and audit privilege statutes may be unable to fulfill these prosecutorial obligations that arise under their delegated authority.[78] The EPA has asserted its ability to revoke states' federal environmental programs enforcement authority as a disincentive to states considering environmental audit privilege legislation. The EPA has threatened to increase enforcement efforts and to closely monitor state enforcement in states that utilize audit privilege laws.[79]

In at least three states (Idaho, Michigan, and Texas), the EPA refused to fully approve permit programs under the Clean Air Act because of the existence of state audit privilege statutes.[80] Instead, the EPA granted interim approval and requested that the states "modify their audit laws so they may receive final approval for their air permit programs."[81] The EPA recently gave Michigan interim approval for its Clean Air Act Operating Permits Program.[82] The EPA refused to grant full approval, citing the Michigan Environmental Audit Privilege and Immunity Law as inhibiting Michigan's enforcement obligations under Part 70.[83] To receive full approval, Michigan's Attorney General must submit a new Title V opinion that allays the EPA's fears and guarantees

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75. Kevin A. Gaynor et al., *Significant RCRA Criminal Developments: 1995 Update*, 26 Env't Rep. (BNA) 2275, at 2276 (Mar. 29, 1996).

76. *Governors Urge U.S. Government to Base Rules on Science, Risk-Reduction Principles*, 29 Env't Rep. (BNA) 1963 (Feb. 1996).

77. *Id.*

78. 61 Fed. Reg. 64,622, 64,626 (1996); 62 Fed. Reg. 1387, 1393 (1997).

79. Wolf, *supra* note 54, at 549.

80. *Law Sought to Crack Down on Polluters*, 37 Env't Rep. (BNA) 1956 (Jan. 21, 1997).

81. *Id.*

82. 62 Fed. Reg. at 1387.

83. *Id.* at 1397.

that enforcement and penalty authority is not impeded by the audit law.[84] The EPA's action against such audit statutes has been called a "knee-jerk" reaction that ignores the benefits that audit statutes provide.[85]

The line that the EPA has drawn was not favorably received by many states. Michigan's Department of Environmental Quality said "the EPA's way out of line."[86] Moreover, Texas is considering a legal challenge to the EPA's ultimatum.[87] Although the EPA seeks to coordinate efforts in enforcement, strong-arming states into agreement impinges on the sovereignty of the state and threatens federal-state partnerships.

Although the EPA hails *its* first-year statistics under its Final Audit Policy as indicative of a "substantial impact on corrections of violations by industry,"[88] the EPA rejects such data from the states. The EPA "believes that it is premature at this point to expect significant empirical evidence to document whether an environmental audit privilege and/or immunity laws enhance or impede environmental compliance. Many of the state audit statutes are little more than one year old."[89]

V. CONCLUSION

If the EPA is to maintain a level playing field between big and small businesses, it is imperative that federal environmental audit privilege legislation be enacted. Large corporations have always been able to cloak their audits in traditional privilege mechanisms, such as attorney-client, work-product, and self-critical theories. Small businesses lack the economic resources to do the same.

Congress should look to the successful efforts of states for guidance in developing fair and effective federal audit privilege legislation. Environmental audit privilege legislation would increase compliance without adding litigation costs. Such legislation does not compel secrecy; no privilege exists without prompt disclosure and correction of the violation. The in camera review does not increase expensive litigation—it is part of our current judicial process. Enacting federal audit privilege legislation will encourage small businesses to join the ranks of the big businesses that try to move "beyond environmental compliance."

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84. *Id.*
85. *Id.* at 1394.
86. *Law Sought to Crack Down on Polluters*, 37 Env't Rep. (BNA) 1956 (Jan. 21, 1997).
87. *Id.*
88. EPA Press Advisory, EPA 97-R-9, Jan. 17, 1997, *available at* 1997 WL 16810, at *2.
89. 62 Fed. Reg. 1387, 1394 (1997); 61 Fed. Reg. 64,622, 64,628 (1996).

Appendix D

Chapter 5

State Environmental Audit Privilege Legislation

§ 5.1 Overview

State legislation encouraging environmental audits has been enacted using a variety of different legal mechanisms. State initiatives to encourage environmental audits have continued to catch the attention of the American public. Currently, over 30 states have enacted or are considering some form of environmental audit privilege legislation or other form of legislation designed to encourage audits. Below is a chart indicating the states that are considering or have enacted environmental audit privilege legislation:

State	Audit Privilege Statutes
ALABAMA	Legislation introduced February 1996.
ALASKA	Legislation introduced January 1996.
ARIZONA	
ARKANSAS	ARK. CODE ANN. §8 1-301 *et seq.*
CALIFORNIA	Legislation introduced in January and February 1996.
COLORADO	COLO. REV. STAT. §§ 13-25-126.5(3), 13-90-107(1), 25-1-114.5
CONNECTICUT	
DELAWARE	Legislation introduced June 1996.
FLORIDA	Legislation died in committees.
GEORGIA	
HAWAII	Legislation introduced January 1995.
IDAHO	IDAHO CODE § 9-801 *et seq*
ILLINOIS	205 ILCS 5/52.2
INDIANA	IND. CODE 13-10-3 *et seq.*
IOWA	Introduced March 1995.
KANSAS	KAN. STAT. ANN. §60-3332 *et seq*

State	Audit Privilege Statutes
KENTUCKY	KY. REV. STAT. ANN. § 224.01-040
LOUISIANA	
MAINE	
MARYLAND	Legislation introduced February 1996.
MASSACHUSETTS	Legislation introduced February 1995.
MICHIGAN	1996 Mich. Pub. Acts 132
MINNESOTA	1995 Minn. Laws 168, to be codified at MINN. STAT. ANN. § 115.07.1
MISSISSIPPI	MISS. CODE ANN. § 49-2-51
MISSOURI	Legislation introduced January 1996.
MONTANA	
NEBRASKA	
NEVADA	
NEW HAMPSHIRE	1996 N.H. Laws 4
NEW JERSEY	Legislation introduced January 1996.
NEW MEXICO	
NEW YORK	Legislation introduced January 1996 and March 1996.
NORTH CAROLINA	Legislation introduced May 1995.
NORTH DAKOTA	
OHIO	Legislation introduced April 1995.
OKLAHOMA	Legislation introduced January 1996.
OREGON	ORE. REV. STAT. §468.963
PENNSYLVANIA	Legislation introduced October 1995.
RHODE ISLAND	Legislation introduced February 1995.

State	Audit Privilege Statutes
SOUTH CAROLINA	1996 S.C. Acts 384
SOUTH DAKOTA	
TENNESSEE	Legislation introduced February 1995.
TEXAS	71 TEX. REV. CIV. STAT. ANN. ART. 4447cc-1 *et seq.*
UTAH	UTAH CODE ANN. § 19-7-101 *et seq.*
VERMONT	Introduced January 1996.
VIRGINIA	VA. CODE ANN. § 10.1-1193 *et seq.*
WASHINGTON	
WEST VIRGINIA	Legislation introduced in January 1996 and February 1996.
WISCONSIN	Legislation introduced March 1996 and May 1995.
WYOMING	WYO. STAT. § 144.765

In addition to environmental audit privilege legislation, many states are also considering legislation that encourages audits in other manners. For example, New York continues to encourage the state to conduct environmental audits in a number of different contexts.

§ 5.2 Issues Raised Concerning Audit Privilege Legislation

As states consider environmental audit privilege legislation certain themes continue to emerge and develop. These include:

1. How should the state define the terms "environmental audit" and "environmental report"?
2. Must the document be labeled "environmental audit" or "privileged" in order for the company to avail itself of a privilege?
3. To what extent should there be a testimonial privilege protecting the data contained in the audit report?
4. What elements and what conditions must exist in order to overcome the privilege?
5. What is the burden of proof? Should it be a preponderance of the evidence standard? What is necessary to establish a prima facie case?

6. To what extent will an immunity be granted for voluntary disclosure? And more significantly, what disclosure is considered voluntary?
7. Should "bad actors" be excluded from the privilege?

The following table describes how the certain states enacting environmental audit privilege legislation have addressed each of these issues:

Legislative Issues	Ark.	Colo.	Idaho	Ill.	Ind.	Ky.	Ore.	Utah	Va.	Wyo.
Effective date of legislation	7/95	6/94	7/95	1/95	7/94	7/94	1/91	6/95	7/95	7/95
Must environmental audit report be labeled	Yes	No	Yes	Yes	Yes	Yes	Yes	No	No	Yes
Penalty reduction for environmental violations voluntarily disclosed	No	Yes	Yes	No	No	No	No	No	Yes	Yes
Testimonial immunity for voluntary disclosure	No	Yes	Yes	No	No	No	No	No	No	No
Express waiver of privilege	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Implied waiver	Yes	NC[1]	NC	NC	NC	Yes	Yes	NC	NC	Yes
Access by [illegible]	Yes[2]	NC	NC	Yes[3]	Yes[4]	Yes[5]	Yes[6]	NC	NC	Yes[7]
Access by [illegible]	No	NC	No	NC	NC	Yes	NC	No	NC	No
[illegible] privilege if [illegible]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NC	Yes	Yes
[illegible] privilege if [illegible]	Yes	NC	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

[1] NC indicates that it is not yet clear, because the legislature did not specifically address the question.
[2] The time required is 30 days.
[3] The time required is 30 days.
[4] The time required is 30 days.
[5] The time required is 20 days
[6] The time required is 30 days.
[7] The time required is 20 days.

Legislative Issues	Ark.	Colo.	Idaho	Ill.	Ind.	Ky.	Ore.	Utah	Va.	Wyo.
No privilege if material shows evidence of noncompliance efforts and compliance efforts were not prompt and pursued with reasonable diligence	Yes	Yes	NC*	Yes	Yes	Yes	Yes	NC*	NC*	Yes
No privilege in criminal proceeding if the prosecutor has a need requiring the information?	NC*	No	NC	NC	Yes	Yes	Yes	NC*	NC	Yes
Party asserting the privilege has the burden of proof for both privilege and demonstration of efforts toward compliance	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
Party seeking disclosure has burden of proving fraudulent purpose	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NC*	Yes	Yes
Legal official or party seeking disclosure has burden of proving other conditions allowing disclosure	Yes	Yes	NC	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Partial disclosure of only issues in dispute allowed	Yes	No	NC	Yes	Yes	Yes	Yes	Yes	Yes	Yes

§ 5.3 State-by-State Review

State legislation encouraging environmental audits has been enacted using a variety of different legal mechanisms. Brief descriptions of some of these statutes follow.

* The degree of need varies tremendously from statute to statute among the following:
- ✓ substantial need;
- ✓ compelling need; or
- ✓ compelling circumstance.

§ 5.3.1 Arkansas[9]

On February 17, 1995, the governor of Arkansas signed certain environmental audit privilege legislation into law.[10] The purpose of the law is to protect the environment. The legislature found that environmental protection "is enhanced by the public's voluntary compliance with environmental laws and that the public will benefit from incentives to identify and remedy environmental compliance issues."[11] Limited expansion of the protection against disclosure will encourage such voluntary compliance and improve environmental quality. The voluntary provisions of the act were designed so that they would "not inhibit the exercise of the regulatory authority by those entrusted with protecting our environment."[12]

The environmental audit privilege was created to protect the confidentiality of communications relating to voluntary internal environmental audits.[13] This privilege would encourage owners and operators of facilities and persons conducting other activities regulated under the environmental laws of the state of Arkansas, or its federal counterparts or extensions, both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with statutory and regulatory requirements.[14]

[9] 1995 Ark. Acts 350.

[10] *Id.*

[11] Ark. Code Ann. § 8-1-301 (Purpose).

[12] *Id.*

[13] *Id.* § 8-1-303(a).

[14] *Id.* § 8-1-303(a). For the environmental audit privilege, the following definitions were adopted, "unless the context otherwise requires":

1. "Commission" means the Arkansas Pollution Control and Ecology Commission.
2. "Director" means the Director of the Arkansas Department of Pollution Control and Ecology.
3. "Environmental audit" means a voluntary, internal and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this chapter, or federal regional or local counterparts or extensions thereof, or of management systems related to that facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with statutory or regulatory requirements. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors . . .

Id. § 8-1-302 (Definitions).

The environmental audit report will be privileged and will not be admissible as evidence in any legal action in any civil, criminal, or administrative legal action including enforcement actions.[14] For purposes of the privilege, "Environmental audit report" means a set of documents prepared as a result of an environmental audit and labeled "ENVIRONMENTAL AUDIT REPORT; PRIVILEGED DOCUMENT" that may include:

(A) Field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys collected or developed for the primary purpose of preparing an environmental audit; and

(B) An audit report prepared by the auditor that includes:
1. The scope of the audit;
2. The information gained in the audit;
3. Conclusions and recommendations; and
4. Exhibits and appendices.

(C) Memoranda and documents analyzing a portion of or all of the audit report and discussing implementation issues.

(D) An implementation plan that addresses correcting past compliance, improving current compliance, and preventing future non-compliance.[15]

The privilege will not apply to the extent that it is waived expressly by the owner or operator of the facility that prepared or caused to be prepared the environmental audit report.[17] In addition, the privilege is waived where

[14] *Id.* § 8-1-303 (b).

[15] *Id.* The privilege does not apply to the following:
(a) Documents, communications, data, reports, or other information that must be collected, developed, maintained, reported, or otherwise made available to a regulatory agency under:
1. federal or state law or extensions thereof;
2. A rule or standard adopted by the Commission;
3. A determination, a permit, or an order made or issued by the Commission or the Director; or
4. Any other federal, state, or local law, permit, or order.
(b) Information obtained by observation, sampling, or monitoring by any regulatory agency.
(c) Information obtained from a source independent of the environmental audit.
§ 8-1-305 (Exceptions).

[17] *Id.* § 8-1-304(a)(1).

the owner or operator of a facility or person conducting an activity seeks to introduce an environmental audit report as evidence.[18]

Finally, where the owner or operator of a facility authorizes the disclosure of the environmental audit report to any party the privilege will be deemed waived, unless the disclosure is made under the terms of a confidentiality agreement between the owner or operator of a facility and (1) a potential purchaser of the facility or (2) a customer, lending institution, or insurance company with an existing or proposed relationship with the facility.[19]

Disclosure made under the terms of a confidentiality agreement between government officials and the owner or operator of a facility will not waive privilege,[20] nor will disclosure made to an independent contractor retained by the owner or operator of the facility for the purpose of identifying noncompliance with statutory or regulatory requirements and assisting the owner or operator in achieving compliance with reasonable diligence.[21]

The waiver of privilege may be for part or all of the environmental audit report.[22] The waiver of privilege, however, extends only to that part of the environmental audit report expressly waived by the owner or operator of a facility.[23]

In a criminal,[24] civil, or administrative proceeding,[25] a court of record or administrative tribunal, after an in camera review, will require disclosure of material for which the environmental audit privilege is asserted if the court or administrative tribunal determines one of the following:

- ✓ The privilege is asserted for a fraudulent purpose;
- ✓ The material is not subject to the privilege;
- ✓ The material is subject to the privilege and the material shows evidence of noncompliance with (A) federal or state law or extensions

[18] *Id.* § 8-1-304(a)(2).

[19] *Id.* § 8-1-304(a)(3)(A).

[20] *Id.* § 8-1-304(3)(B).

[21] *Id.* § 8-1-304(3)(C).

[22] *Id.* § 8-1-304(b).

[23] *Id.* For purposes of determining waiver, "the parties to a legal action may at any time stipulate that the entry of an order that directs that specific information contained in an environmental audit report is or is not subject to the privilege . . ." *See* § 8-1-306.

[24] *Id.* § 8-1-308 (Disclosure in a criminal proceeding).

[25] *Id.* § 8-1-307(a) (Discussing disclosure in civil or administrative proceeding).

of such statutes; or (B) any rule or regulation adopted by the Commission; or (C) a determination, permit, or order issued by the Commission or the Director; and

✓ The person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence.[26]

If the noncompliance constitutes a failure to obtain a required permit, the person is deemed to have made appropriate efforts to achieve compliance if the person filed an application for the required permit not later than ninety days after the date the person became aware of the noncompliance.[27] In the event additional time is required to prepare a permit application, the person must, within ninety days, submit a schedule to the Department of Pollution Control and Ecology that identifies the activities required to complete the application. If that suggested schedule is acceptable to the Department of Pollution Control and Ecology, the filing of the application pursuant to the submitted schedule will constitute reasonable diligence to achieve compliance for a failure to obtain a required permit.

A prosecuting authority who, based on information obtained from a source independent of an environmental audit report, has probable cause to believe an offense has been committed under the environmental laws, rules, or standards adopted by the Commission, or a determination, permit, or order issued by the Commission or Director may obtain an environmental audit report for which the audit privilege is asserted under certain limited circumstances.[28] The prosecuting authority may obtain the report (1) under a search warrant, (2) under a subpoena, or (3) through discovery.

The prosecuting authority must immediately place the report under seal and cannot review or disclose the contents of the report.[29] Not later than thirty days after the date the prosecutor obtained the report, the owner or operator who prepared the report or caused the report to be prepared may file with the appropriate court or administrative tribunal a petition requesting an in camera hearing on whether the report or portions of the

[26] *Id.* §§ 8-1-307 & 8-1-308(a).
[27] *Id.* §§ 8-1-307(b) & 8-1-308(b).
[28] *Id.* § 8-1-309(a) (Proceeding to obtain environmental audit report).
[29] *Id.* § 8-1-309(a).

report are (1) privileged or (2) subject to disclosure.[30] The right to claim the privilege is waived if the owner or operator does not file a petition.

A court or administrative tribunal that receives a petition must issue an order scheduling an in camera hearing for a date that is not later than forty-five days after the date the petition was filed under subsection (b). The order must allow the prosecuting authority to do the following:

1. Remove the seal from the environmental audit report.
2. Review the environmental audit report.
3. Place appropriate limits on the distribution and review of the environmental audit report to protect against unnecessary disclosure.[31]

The prosecuting authority may consult with enforcement agencies regarding the contents of the environmental audit report as necessary to prepare for the in camera hearing. However, the contents of the environmental audit report used in preparation for the in camera hearing may not be used in any investigation or in any proceeding against the defendant unless determined by a court or administrative tribunal not to be subject to the audit privilege and must otherwise be kept confidential unless the information is found by the court to be subject to disclosure.

A party asserting the environmental audit privilege has the burden of proving the privilege, including if there is evidence of noncompliance with federal or state law or extensions thereof, proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence.[32] A party seeking disclosure has the burden of proving the privilege is asserted for a fraudulent purpose. The prosecuting authority seeking disclosure has the burden of proving the conditions for disclosure set forth in the privilege statute.

Upon making a determination, the court of record or administrative tribunal may compel disclosure of only those parts of an environmental audit report that are relevant to issues in dispute in the proceeding.[33]

Nothing in the statute will limit, waive, or abrogate the scope of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.[34] Similarly, nothing in the statutes will limit,

[30] *Id.* § 8-1-309(b).
[31] *Id.* § 8-1-309(c).
[32] *Id.* § 8-1-310(a) (Burden of proof).
[33] *Id.* § 8-1-311 (Partial disclosure).
[34] *Id.* § 8-1-312(a).

waive or abrogate the rights of the public as provided for in the Arkansas Freedom of Information Act."[35]

The Arkansas law is not subject to any sunset provision.[36] Moreover, the legislature expressly repealed "all laws and parts of laws in conflict with" the law.

§ 5.3.2 Colorado[37]

Colorado law dictates, under its penalty provisions for violations of the air pollution control laws, that in determining the amount of any civil penalty, the "existence and scope of a regularized and comprehensive environmental compliance program or an environmental audit program" will be one factor considered when setting both civil and criminal penalties, where applicable."[38]

In evaluating Colorado's Title V operating permit program, EPA was asked to consider the role of Colorado's audit privilege statute. Specifically, according to EPA, "Two commenters expressed concern with the EPA proposal to consider Colorado's law (S.B. 94-139) preventing the admission of voluntary environmental audit reports as evidence in any civil, criminal or administrative proceeding as 'wholly external' to Colorado's Program and asserted that these provisions are consistent with congressional intent and EPA policy, and the Federal Government should not interfere in the State's interpretation and exercise of its own prosecutorial discretion." In addition, the EPA reported that "one commenter also stated that, absent the audit privilege, it would be unlikely that voluntarily disclosed information would be identified and further indicated that, although title V may be delegated by EPA, such delegation does not preempt or require the State to defend its laws to EPA."

[35] *Id.* § 8-1-312(b).
[36] 1995 Ark. Acts 350.
[37] COLO. REV. STAT. § 25-7-122 (1993); COLO. REV. STAT. § 25-15-309 (1993).
[38] COLO. REV. STAT. § 25-7-122 (1993) (civil penalties). *See also* C.R.S. 25-15-3[illegible] (1993). Note that these provisions are inspired by the Justice Department's guidance concerning environmental audits.
[39] 60 Fed. Reg. 4563, Clean Air Act Final Interim Approval of Operating Permits Program; State of Colorado (January 24, 1995) (Final interim approval).

In response to these inquiries, "EPA did not identify this as an approval issue and stated that it is not clear at this time what effect this privilege might have on title V enforcement actions." Instead, EPA said that:

> A national position on approval of environmental programs in states which adopt statutes that confer an evidentiary privilege for environmental audit reports is being established by EPA. Further, EPA disagrees with the commenter's interpretation of congressional intent and EPA policy. Congressional intent was to encourage owners and operators to do self-auditing and correct any problems expeditiously, but this is not the same as providing an evidentiary privilege and enforcement shield. Congress could have provided such a privilege and shield in the Act, but did not. Section 113 of the Act and title V contain no exceptions for withholding self-auditing reports as evidence in any enforcement proceeding. Likewise, 40 CFR part 70 contains no such exceptions. Also, EPA disagrees with the commenter's assumption that, absent the audit privilege provided by Colorado law, it is unlikely that voluntarily disclosed information would otherwise be identified. For example, section 114 of the Act gives EPA the authority to issue information requests and requires disclosure of information regardless of whether it is generated through a self-audit. Colorado has similar authority.[40]

Although EPA agreed in principle "that Colorado has the authority to [illegible] its own laws regarding environmental matters as long as the area has [illegible] been preempted by Congress,"[41] the agency made some thinly veiled [illegible]ats to the state concerning the potential effect of use of audit privilege [illegible]ulation on ability of the states to retain federal programs. For example, [illegible]PA said:

> . . . title V of the Act and the part 70 regulations give EPA the responsibility to ensure that states implement their operating permit programs in accordance with title V and part 70. Thus, if Colorado's self-audit privilege impedes Colorado's ability to implement and enforce its Program consistent with title V and part 70, EPA may find it necessary to withdraw its approval of the Colorado Program.[42]

[40] 60 Fed. Reg. 4564 (1995).
[41] 60 Fed. Reg. 4564 (1995).
[42] 60 Fed. Reg. 4563, 4564–65 (1995).

§ 5.3.3 Idaho[43]

On March 22, 1995, the governor of Idaho signed into law the "Environmental Audit Protection Act,"[44] the purpose of which "is to encourage owners and operators of facilities and other persons conducting activities regulated under applicable environmental laws to conduct voluntary internal environmental audits of their activities, operations, compliance programs and management systems and to assess and improve compliance with applicable environmental laws while protecting confidentiality of communications relating to voluntary internal environmental audits."[45] The legislature's goal was to have "all persons . . . comply with environmental laws and regulations."[46] Idaho determined that, in meeting this goal, "voluntary environmental audits are in the public interest."[47]

The legislature found that "voluntary compliance with environmental laws and regulations will protect the public health, safety and welfare in the most efficient and effective manner."[48] Thus, the legislature enacted the environmental audit privilege legislation in an effort to encourage all persons, corporations, government agencies, and associations to conduct detailed audits or self-evaluations of compliance with environmental statutes and regulations.[49]

To encourage owners and operators of facilities, and persons conducting activities regulated under federal, state, and local environmental laws, regulations, rules, ordinances, and permits, to conduct voluntary internal environmental audits, to develop compliance programs, and to implement management systems, the legislature of the state of Idaho recognizes that an environmental audit privilege is necessary. The legislature of the state of Idaho further recognizes that voluntary disclosure

[43] 1995 Idaho Sess. Laws 359.

[44] IDAHO CODE § 9-801.

[45] *Id.* § 9-802(a). In addition, § 9-810 requires the environmental agencies to promulgate rules further defining an environmental audit and timetables for remedial action to be performed and rules governing the treatment of environmental audit reports or confidential business information within one hundred eighty (180) days of the effective date of the statute. *Id.* § 9-810(1).

[46] *Id.* § 9-802(b).

[47] *Id.* § 9-802(e).

[48] *Id.* § 9-802(c).

[49] *Id.* § 9-802(d).

of information developed during an environmental audit to regulatory agencies should be encouraged and that the development of an environmental program to correct environmental problems and to achieve compliance with regulations should also be encouraged. To that end the legislature is establishing immunities for violations of laws and rules voluntarily disclosed to environmental agencies.[50] The legislature of the state of Idaho is further strengthening protections for confidential business

[50] For purposes of this law, the following definitions apply:

1. "Document," as used in this legislation, includes writings, drawings, graphs, charts, photographs, phone records and other data compilations, including electronic, from which information can be obtained or translated.
2. "Environmental agency" shall mean any department or division of the state, local government or health board with authority to enforce any state environmental law.
3. "Environmental audit" means an internal evaluation done pursuant to a plan or protocol that is designed to identify and prevent noncompliance and to improve compliance with statutes, regulations, permits and orders. An environmental audit may be conducted by an owner or operator, by an owner or operator's employees or by an independent contractor. An environmental audit may include:
   (a) One (1) or more facilities;
   (b) Any activity at one (1) or more facilities;
   (c) Impacts on one (1) or more environmental media at a facility or facilities; or
   (d) Management systems related to a facility, an activity or an impact on environmental media.
4. "Environmental audit report" means a set of documents, each labeled "Environmental Audit Report" (or a substantive equivalent label), and prepared as a result of an environmental audit. An environmental audit report may include field notes, records of observations, findings, opinions, suggestions, implementation plans, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, data, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report may include memoranda and documents analyzing portions or all of the audit report.
5. "Environmental law" means any federal, state or local law, regulation, rule, ordinance or permit terms and conditions designed to protect or enhance the quality of land, water or air for the protection of human health, wildlife, other biota, or the environment.
6. "Person" means any individual, firm, association, partnership, joint stock company, trust, estate, political subdivision, public or private corporation, state or federal governmental department, agency or instrumentality, or any other legal entity which is recognized by the law as the subject of rights and duties.
7. "In camera review" means a hearing or review in a courtroom, hearing room or chambers, to which the general public is not admitted. After such hearing or

information including environmental audits that are submitted to environmental agencies.[51]

No state of Idaho public official, employee, or environmental agency will be required to disclose an environmental audit report prepared by or on behalf of any person, except from the state of Idaho or any political subdivision.[52]

Similarly, the statute does not prohibit a request for information, investigation, or disclosure of information required to be disclosed pursuant to federal and state law, rule, or regulation. Rather, the law mandates that documents, communications, data, reports, and other information that must be collected, developed, and reported pursuant to federal and state law, rule, and regulation must be disclosed in accordance with the applicable law, rule, or regulation.[53]

The environmental audit prohibition against compelled disclosure does not apply to the extent that it is waived expressly by the owner or operator of a facility.[54] A waiver may be full or partial; however, waivers only apply to the portions of the environmental audit report that are specifically waived.

The prohibition against disclosure does not apply if the environmental agency or court after in camera review determines that protection for the audit report is for a fraudulent purpose or the material is not an appropriate subject for an environmental audit.[55]

The party seeking disclosure of the environmental audit report has the burden of proving the disclosure is appropriate,[56] perhaps because the privilege was asserted for a fraudulent purpose. The existence of a written environmental compliance policy or adoption of a plan of action to meet

review, the content of the oral and other evidence and statements of the presiding hearing officer and counsel shall be held in confidence by those participating in or present at the hearing or review, and any transcript of the hearing or review shall be sealed and not considered a public record until or unless its contents are disclosed by a court having jurisdiction over the matter.

Id. § 9-803.

[51] *Id.* § 9-802(2).

[52] *Id.* § 9-804 (prohibition against compelled disclosure).

[53] *Id.* § 9-805 (required disclosures).

[54] *Id.* § 9-806 (exceptions).

[55] *Id.* § 9-806(2). In addition, there is a long list of records that are exempt from disclosure pursuant to the statutes. *See* § 9-340 (records exempt from disclosure).

[56] *Id.* § 9-806(3).

applicable environmental laws constitutes prima facie evidence that an environmental audit report was designed to prevent noncompliance and improve compliance with environmental laws and that the environmental audit is protected from disclosure.

The prohibition against disclosure of the environmental audit report does not extend to certain documents or information, including

1. Documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available to an environmental agency pursuant to any environmental law or permit;
2. Information obtained by observation, sampling, or monitoring by an environmental agency; or
3. Information obtained from a source independent of the environmental audit.[57]

The environmental audit privilege legislation will not in any way limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.[58]

Any person who makes a voluntary disclosure of an environmental audit report, or relevant portions thereof, that identifies circumstances that may constitute a violation of any state environmental law to the appropriate environmental agency, will be immune from state prosecution, suit, or administrative action for any civil or criminal penalties or incarceration for acts associated with the issues disclosed.[59] Under the law, a disclosure is rebuttably presumed voluntary if three conditions are met: (1) the disclosure was made by the owner or operator in a timely manner, after receipt of the environmental audit report to the environmental regulatory agency having regulatory authority; (2) the disclosure arises out of an environmental audit; and (3) the owner or operator making the disclosure "immediately initiates appropriate efforts to achieve compliance, pursues compliance with due diligence, and expeditiously achieves compliance within a reasonable period after the completion of the environmental audit."[60]

Where audit evidence shows the noncompliance to be the failure to obtain a permit, or other governmental permission, appropriate efforts to

[57] *Id.* § 9-807.

[58] *Id.* § 9-808.

[59] *Id.* § 9-809(1).

[60] *Id.* § 9-809(2).

correct the noncompliance may be demonstrated by the submittal of a permit application or equivalent document within a reasonable time.[41] The person may, but is not required to, enter into a voluntary consent order with the environmental regulatory agency to achieve compliance. Any disclosure to an environmental agency required by law or pursuant to a specific permit condition or order is not considered a voluntary disclosure to the environmental agency.[42]

Immunity against administrative, civil, or criminal penalties or incarceration or other type of enforcement action does not apply if a person or entity has been found by a court to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, regulations, permit conditions, settlement agreements, or consent orders, which were due to separate and distinct events giving rise to the violations within the three-year period prior to date of the disclosure. Such a pattern of continuous repeated violations may also be demonstrated by multiple settlement agreements related to substantially the same alleged violations concerning serious instances of noncompliance with environmental laws that occur within the three-year period immediately prior to the date of the voluntary disclosure.[43]

The statute does not otherwise affect any authority of an environmental agency to require remedial action through a consent order or action in district court or to abate an imminent hazard, associated with the information disclosed in any voluntary disclosure of an environmental violation.[44] In circumstances in which the governor deems an imminent and substantial danger to the public health or the environment exists, the governor may disclose such information contained in the audit, excluding trade secrets, as may be necessary to ensure the protection of the public health or environment.[45]

The Idaho law took effect July 1, 1995, and sunsets on December 31, 1997.

[41] *Id.* § 9-809(3).
[42] *Id.* § 9-809(5).
[43] *Id.* § 9-809(6).
[44] *Id.* § 9-809(7).
[45] *Id.* § 9-810(2).

§ 5.3.4 Illinois

The Illinois legislature became the fifth state to pass environmental audit privilege legislation.[46] Senate Bill 1724 was supported unanimously by the Illinois House and passed the Illinois Senate by a vote of 50 to 7 on Dec. 1, 1994. The legislation was forwarded to Governor James Edgar for approval.

On January 24, 1995, the Illinois environmental audit privilege became effective. Its goal was "to encourage owners and operators of facilities and persons conducting other activities regulated under State, federal, regional, or local laws, ordinances, regulations, permits, or orders to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with those laws." The environmental audit privilege[47] protects the confidentiality of communications relating to voluntary internal environmental audits.[48] The law does not, however, limit, waive, or abrogate existing or future obligations of regulated entities to monitor, record, or report information required under state, federal, regional, or local laws.

[46] The first four states that enacted laws granting qualified privilege status to information gleaned from environmental audits were Colorado (S.B. 94-139; COLO. REV. STAT. § 13-25-126.5 *et seq.*), Indiana (P.L. 16-1994; IND. STAT. ANN. § 13-10-3), Kentucky (KY. REV. STAT. ANN. §224.01-040), and Oregon (OR. REV. STAT. § 468.963(1)). These four laws represent the "first generation" environmental audit privilege statutes.

[47] For purposes of the environmental audit privilege the following definitions apply:

"Environmental audit" means a voluntary, internal, and comprehensive evaluation of one or more facilities or any activity at one or more facilities regulated under State, federal, regional, or local laws or ordinances, or of management systems related to the facilities or activity, that is designed to identify and prevent noncompliance and to improve compliance with those laws. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors.

"Environmental audit report" means a set of documents, each labeled "Environmental Audit Report: Privileged Document" and prepared as a result of an environmental audit. An environmental audit report shall include a written response to the findings of the audit. An environmental audit report shall also include, as applicable, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys, provided that this supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have 4 components:

ordinances, regulations, permits, or orders."[68] Nor does the law alter the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.[70]

Under the law, an "environmental audit report is privileged information and is not admissible as evidence in any legal action in any civil, criminal, or administrative proceeding," except in certain enumerated circumstances.[71] The privilege does not apply to the extent that it is expressly waived by the owner or operator of a facility who prepared or caused to be prepared the environmental audit report.[72]

In addition, in a civil, criminal, or administrative proceeding, a court of record or the board, after an in camera review, will require disclosure of environmental audit, if the court or the board determines one of the following:

- ✓ The privilege is asserted for a fraudulent purpose.
- ✓ The material is not subject to the privilege.
- ✓ The material shows evidence of noncompliance with state, federal or local environmental laws, regulations, ordinances, permits, or orders, and the owner or operator failed to undertake appropriate

1. An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions, and recommendations together with exhibits and appendices.
2. Memoranda analyzing portions or all of the audit report and discussing potential implementation issues.
3. An implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.
4. Analytic data generated in the course of conducting the environmental audit.

ILL. STAT. ANN. ch. 415 para 5/52.2(i).

[68] *Id.* § 52.2 (a). The environmental audit privilege does not extend to any of the following:

1. Documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available to a regulatory agency under this Act or federal, State, or local law, ordinance, regulation, permit, or order.
2. Information obtained by observation, sampling, or monitoring by a regulatory agency.
3. Information obtained from a source independent of the environmental audit.

Id. § 52.2(h).

[70] *Id.* § 52.2(h).

[71] *Id.* § 52.2(j).

[72] *Id.* § 52.5(b).

[73] *Id.* § 52.2(d)(1).

corrective action or eliminate any reported violation within a reasonable time.[74]

An owner or operator asserting the environmental audit privilege has the burden of demonstrating the applicability of the privilege.[75] The state's attorney or attorney general, when seeking disclosure, has the burden of proving the enumerated elements necessary to prove the privilege should not apply.[76]

An owner or operator asserting the environmental audit privilege in response to a request for disclosure must provide to the state's attorney, attorney general, or other person, as the case may be, at the time of filing any objection to the disclosure, all of the following information:

- ✓ The date of the environmental audit report.
- ✓ The identity of the entity conducting the audit.
- ✓ The name and location of the audited facility.
- ✓ An identification of the portions of the environmental audit report for which the privilege is being asserted.

Whenever a state's attorney or the attorney general has sought and been denied, in any civil, criminal, or administrative proceeding, disclosure of material found by a court or the board to be privileged, the state's attorney or attorney general must not thereafter initiate a written request for the audit material from any owner or operator who was a party to that proceeding.[78]

Within thirty days after the state's attorney or attorney general makes a written request by certified mail for disclosure of an environmental audit report under this subsection, the owner or operator who prepared or caused

[74] *Id.* § 52.2(d)(2). In a criminal proceeding, the court or the board, after an in camera review, must require disclosure of material for which the privilege is asserted, if the court or the board determines one of the following:

- ◆ The privilege is asserted for a fraudulent purpose.
- ◆ The material is not subject to the privilege.
- ◆ The material shows evidence of noncompliance with state, federal, or local environmental laws, regulations, ordinances, permits, or orders and the owner or operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the environmental audit within a reasonable time.

[75] *Id.* § 52.2(b)(3).

[76] *Id.* An owner or operator asserting the environmental audit privilege has the burden of demonstrating the applicability of the privilege in the criminal context as well. The state's attorney or the attorney general has the burden of proving that the elements showing audit should not be privileged are present in criminal context as well as civil.

[78] *Id.* § 52.2(d)(5).

the report to be prepared may file with the appropriate court, or the board, a petition requesting an in camera hearing on whether the environmental audit report or portions of the report are privileged under this Section or subject to disclosure." The circuit court or the board has jurisdiction over a petition filed by an owner or operator under this subsection requesting an in camera hearing on whether the environmental audit report or portions of the report are privileged or subject to disclosure. Failure by the owner or operator to file a petition waives the privilege.

An owner or operator asserting the environmental audit privilege in response to a request for disclosure must include in its request for an in camera hearing all of the following:

- ✓ The year the environmental audit report was prepared.
- ✓ The identity of the entity conducting the audit.
- ✓ The name of the audited facility.
- ✓ The portion of the environmental audit report for which the privilege is being asserted.

Upon the filing of a petition, the court or the board must issue an order scheduling, within forty-five days after the filing of the petition, an in camera hearing to determine whether the environmental audit report or portions of the report are privileged or subject to disclosure.

Upon making a determination, the court or the board must compel the disclosure of only those portions of an environmental audit report that are relevant to issues in dispute in the proceeding."[78]

The Illinois law contains a limited testimonial privilege. If an owner or operator performs or directs the performance of an environmental audit, an officer or employee involved with the environmental audit, or any consultant who is hired for the purpose of performing the environmental audit, may not be examined as to the environmental audit or any environmental audit report as defined by the statute. The limited testimonial privilege will not, however, apply if the state sustains its burden of proving there should be no privilege for the underlying audit document.

Of course, the parties to a conflict involving the environmental audit privilege may, at any time, stipulate to entry of an order directing that specific information contained in an environmental audit report is or is not subject to the privilege.

[77] *Id.* § 52.2(e)(1).
[78] *Id.* § 52.2(g).

§ 5.3.5 Indiana[79]

The Indiana legislature adopted a limited self-evaluation privilege for environmental audits. In order to take advantage of this statute, the audit must be labeled "Environmental Audit Report: Privileged Document."[80] The new self-evaluation privilege for environmental audits was designed to supplement existing common law privileges, such as the attorney-client privilege and the work product doctrine.

The privilege is not absolute. The privilege may be waived either by express action or by implication.[81] Information provided to a regulatory agency under an existing permit, order, or statute is not privileged.[82] In addition, the statute grants a court discretion to compel disclosure in a civil or criminal proceeding when the privilege is asserted for a fraudulent purpose. In addition, in a criminal proceeding the audit report may be subject to an in camera review where the report is sought by a search warrant or criminal subpoena.[83]

Additional protections provided by the statute include a mandate that a regulatory agency is precluded from adopting a rule or permit condition that is designed to circumvent the environmental audit privilege. In addition, if the environmental audit reveals the need for a regulatory permit, the entity will be deemed in compliance with law if application for the permit is made within ninety days. Finally, the Indiana statute provides that where an environmental audit is submitted to the state as aa confidential document, the privilege created by statute will not be deemed waived.[84]

§ 5.3.6 Kansas

On April 22, 1995, the Kansas legislature enacted a limited privilege for environmental compliance audits.[85] The act dictated that audit reports,[86]

[79] IND. CODE ANN. §§13-10-3-1 to 13-10-12 (West 1995).
[80] *Id.* § 13-10-3-2.
[81] *Id.* § 13-10-3-9.
[82] *Id.* § 13-10-3-11.
[83] *Id.* §§ 13-10-3-4 to 13-10-3-7.
[84] *Id.* § 13-10-3-11.
[85] 1995 Kansas Senate Bill 76, codified as KAN. STAT. ANN. § 60-3332 *et seq.* (1995).
[86] As used in KAN. STAT. ANN. §§ 60-3332 through 60-3339 (1995 Supp.):
(a) "Audit" means a voluntary, internal assessment, evaluation or review, not otherwise required by environmental law, that is performed by the owner or operator,

as that term is defined by statute, will be subject to discovery, but will be inadmissible as evidence in any civil, criminal, or administrative proceedings. For purposes of satisfying the Kansas law, a management system shall be deemed to satisfy the requirements of this act if it contains the following primary characteristics:

(A) a system that covers all parts of the entity's operations regulated under one or more environmental laws;

(B) a system that regularly takes steps to prevent and remedy noncompliance;

(C) a system that has the support of senior management;

(D) the entity implements a system that has policies, entity standards, and procedures that highlight the importance of ensuring compliance with all environmental laws;

(E) the entity's policies, standards, and procedures are communicated effectively to all in the entity whose activities could affect compliance achievement;

the owner's or operator's employees, or a qualified auditor and initiated by the owner or operator of a facility for the express and specific purpose of determining whether a facility, operation within a facility or facility management system complies with environmental laws. Once initiated an audit shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted or continuous auditing.

(b) "Audit report" means a set of documents, each labeled "Audit Report: Privileged Document" and prepared as a result of an audit. An audit report may include the following supporting information, if collected or developed for the primary purpose and in the course of an audit: Field notes and records of observations, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs and surveys. An audit report, when completed, may have three components:

1. An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
2. memoranda and documents analyzing all or part of the audit report and discussing potential implementation issues; and
3. an implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.

(c) "Facility" means all contiguous land, structures and other appurtenances and improvements on the land.

(d) "Qualified auditor" means a person or organization with education, training and experience in preparing studies and assessments.

(e) "Environmental law" means any requirement contained in state environmental statutes and in rules and regulations promulgated under such statutes.

(F) specific individuals within both high-level and plant- or operation-level management are assigned responsibility to oversee compliance with such standards and procedures;

(G) the entity undertakes regular review of the status of compliance, including routine evaluation and periodic auditing of day-to-day monitoring efforts, to evaluate, detect, prevent, and remedy noncompliance;

(H) the entity has a reporting system that employees can use to report unlawful conduct within the organization without fear of retribution; and

(I) the entity's standards and procedures to ensure compliance are enforced through appropriate employee performance, evaluation, and disciplinary mechanisms.

The criteria will vary depending on the nature of the entity, including its size, its financial resources and assets, and the environmental risks posed by its operations, and based on a qualitative assessment of the totality of circumstances.

Certain exceptions apply. The privilege will not be recognized if it has been waived by the owner or operator of the audited facility. Similarly, the privilege will not be recognized if it is asserted for a fraudulent purpose. Finally, the privilege cannot be used to hide criminal activities. The statute allows for an in camera review of the audit documents to determine whether the privilege is applicable.

The Kansas statute has a qualified testimonial immunity.[67] Under the statute, there is a rebuttable presumption of immunity from any administrative, civil, or criminal penalties for the violation disclosed if the disclosure is one:

1. made promptly after knowledge of the information disclosed is obtained by the person or entity;
2. made to an agency having regulatory authority with regard to the violation disclosed;
3. arising out of an audit;
4. for which the person or entity making the disclosure initiates action in a diligent manner to resolve the violations identified in the disclosure; and

[67] *Id.* § 60-3338.

5. in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation of the issues identified in the disclosure.

A disclosure is not voluntary for purposes of the immunity provision if it is required by state law to be reported to a regulatory authority.

The presumption may be rebutted and penalties may be imposed under state law if it is established that

1. the disclosure was not voluntary;
2. the violation was committed intentionally and willfully by the person or entity making the disclosure;
3. the violation was not fully corrected in a diligent manner; or
4. significant environmental harm or a public health threat was caused by the violation.

In any enforcement action brought against a person or entity regarding a violation for which the person or entity claims to have made a voluntary disclosure within the privilege statute, the burden of proof shifts concerning whether the disclosure is voluntary. The person or entity making the voluntary disclosure claim will have the burden of establishing a prima facie case that the disclosure was voluntary. Once a prima facie case of voluntary disclosure is established, however, the opposing party will have the burden of rebutting the presumption by a preponderance of the evidence.

§ 5.3.7 Kentucky[88]

In order to encourage owners and operators of facilities and persons conducting other regulated environmental activities, or its federal, regional, or local counterparts or extensions, both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with statutory and regulatory requirements, "an environmental audit privilege is created to protect the confidentiality of communications relating to voluntary internal environmental audits."[89] With certain enumerated exceptions, environmental audit reports will be privileged and will not be admissible as evidence in any legal action in any civil, criminal, or administrative

[88] KY. REV. STAT. ANN. § 224.01-040 (Michie 1994).

[89] *Id.* § 224.01-040(2) (1994). For purposes of the statute, the following definitions were established:

proceeding.[90] The privilege does not apply to the extent that "it is waived expressly or waived by implication by the owner or operator of a facility or persons conducting an activity that prepared or caused to be prepared the environmental audit report."

Similarly, if the owner or operator of a facility or person conducting an activity seeks to introduce an environmental audit report as evidence, then the privilege for the entire report will be waived. Kansas, thus, allows no partial waivers. Seeking to introduce any part of the report will constitute waiver of the privilege for the *entire* report.[91]

In a civil or administrative proceeding, a court of record, after a private review consistent with the Kentucky Rules of Civil Procedure, must require disclosure of privileged environmental audit material, if the court determines that any one of three factors warrants disclosure:

1. The privilege is asserted for a fraudulent purpose;
2. The material is not subject to the privilege; or

(a) "Environmental audit" means a voluntary, internal, and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this chapter, or federal, regional, or local counterparts or extensions thereof, or of management systems related to that facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with statutory or regulatory requirements. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors; and

(b) "Environmental audit report" means a set of documents, each labeled "environmental audit report; privileged document" and prepared as a result of an environmental audit. An environmental audit report may include field notes and records of observations, findings, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys, provided the supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, shall have three (3) components:

1. An audit report prepared by an auditor, which shall include the scope and date of the audit and the information gained in the audit together with exhibits and appendices, and may include conclusions and recommendations;
2. Memoranda and documents analyzing part or all of the audit report and discussing implementation issues; and
3. An audit implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.

[90] *Id.* § 224.01-040(3).

[91] *Id.* § 224.01-040(b).

3. Even if subject to the privilege, the material shows evidence of noncompliance with environmental law, or with the federal, regional, or local counterparts or extensions thereof, and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence.

In a criminal proceeding, a court of record, after a private review, must also require disclosure of privileged environmental audit material if any of the above three factors are found. The criminal context, however, adds a fourth factor:

The material contains evidence relevant to commission of certain enumerated offenses and the prosecuting authority has a need for the information.

An environmental audit report found subject to disclosure for this reason, will not be deemed privileged in any criminal proceeding.

The party asserting the environmental audit privilege has the burden of proving the privilege, including, if there is evidence of noncompliance with this chapter or the federal, regional, or local counterparts or extensions thereof, proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence.[92] A party seeking disclosure of the otherwise privileged audit, including a prosecuting authority seeking disclosure, has the burden of proving that the privilege is asserted for a fraudulent purpose.

The prosecuting authority, having probable cause to believe certain enumerated environmental crimes have been committed, based upon information obtained from a source independent of an environmental audit report, may obtain an otherwise privileged environmental audit report pursuant to a search warrant, criminal subpoena, or discovery as allowed by the Kentucky Rules of Criminal Procedure or any applicable statute. The prosecuting authority must immediately place the report under seal and must not review or disclose its contents.

Within twenty days of the prosecuting authority's obtaining an environmental audit report, the owner or operator who prepared or caused to be prepared the report, or the prosecuting authority, may file with the

[92] *Id.* § 224.01-040.

appropriate court a petition requesting a private hearing on whether the environmental audit report or portions thereof are privileged under this section or subject to disclosure. Failure by the owner or operator to file such a petition will waive the privilege.

Upon filing a petition, the court must issue an order scheduling a private hearing, within thirty days of the filing of the petition, to determine whether the environmental audit report or parts of the report are privileged or subject to disclosure. The order must also allow the prosecuting authority immediately to remove the seal from the report and to review the entire report and must place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure.

The prosecuting authority may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the private hearing. The information used in preparation for the private hearing must not be used in any investigation or in any proceeding against the defendant, and must otherwise be kept confidential, unless and until the information is found by the court to be subject to disclosure. Upon making a determination, the court may compel the disclosure only of those portions of an environmental audit report relevant to issues in dispute in the proceeding.

Parties to a dispute may, of course, at any time stipulate to the entry of an order directing that specific information contained in an environmental audit report is or is not subject to the statutory environmental audit privilege.

The environmental audit privilege established in Kentucky does not shield to

(a) Documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or made available to a regulatory agency pursuant to state environmental law or administrative regulations promulgated pursuant thereto, or other federal, state, or local law, ordinance, regulation, permit, or order, and any information developed relating to any release subject to state environmental law;

(b) Information obtained by observation, sampling, or monitoring by any regulatory agency; or

(c) Information obtained from a source independent of the environmental audit.

Nothing in the Kentucky law limits, waives, or otherwise abrogates the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.[93] Nor does the law limit, waive, or abrogate any reporting requirement state law or permit conditions.

§ 5.3.8 Michigan

On March 18, 1996, the governor of Michigan approved an act to amend the Public Acts of 1994. The amendment, entitled Part 148 Environmental Audit Privilege and Immunity, provides a privilege to an environmental audit report,[94] defined by the act as "a document or set of documents, each labeled at the time it is created 'environmental audit report: privileged document' and created as a result of an environmental audit."[95]

The privilege not only protects the actual audit report from disclosure, but also protects auditors and recipient of the audit report from testifying about information in the report that is privileged.[96]

The act clearly excludes certain documents and reports from the privilege, although they might be included in an audit report.[97] This exclusion applies to information required to be reported by law, information obtained by a regulatory agency, pretreatment monitoring results, information obtained from independant sources, and machinery and equipment maintenance records.[98]

The act permits express waiver of the privilege.[99] Disclosure of the report, however, by the person who received the report to that person's employee, legal representative, or agent does not constitute a waiver of the privilege.[100] Waiver by disclosure also does not occur when made under the terms of confidentiality.[101]

[93] *Id.*
[94] 1996 Mich. Pub. Acts 132, § 14802(2).
[95] *Id.* § 14801(b).
[96] *Id.* § 14802(4).
[97] *Id.* § 14802(3).
[98] *Id.* § 14803(3)(a)-(e).
[99] *Id.* § 14803(1).
[100] *Id.* § 14803(2)(a), (b), (c).
[101] *Id.* § 14803(3)(a), (b).

As with other state audit privilege legislation, the privilege may be asserted when disclosure of the report is requested.[102] Objection to disclosure leads to an in camera review and hearing.[103] The court then decides the status of the audit report based on the asserted purpose for the privilege, whether the materials contained in the report qualify for the privilege, and, even if subject to the privilege, whether evidence of noncompliance with the laws appears.[104] The court's finding may be appealed.[105]

The act allows an environmental audit report to be seized pursuant to a search warrant; however, the report is immediately placed under seal with the court.[106] Parties eligible to assert the privilege receive notice of the filing and have thirty days to assert the privilege and file an objection to disclosure.[107] Failure to make an objection constitutes waiver of the privilege.[108] The court then conducts an in camera review and either finds the privilege valid or permits disclosure.[109]

In addition to providing a privilege, the act also permits a person to be immune from penalties if the person voluntarily discloses audit findings of noncompliance and performs all requirements listed in the act that make the person's actions voluntary.[110]

Finally, the act includes a provision that calls for an evaluation of the environmental audit privilege and immunity amendment within five years of its effective date.[111]

§ 5.3.9 Minnesota

Minnesota's environmental audit privilege statute defines an "environmental audit" as a "systematic, documented, and objective review by a regulated entity of one or more facility operations and practices related

[102] *Id.* § 14804(1).
[103] *Id.*
[104] *Id.* § 14804(4) (a), (b); (5).
[105] *Id.* § 14804(6).
[106] *Id.* § 14805(1).
[107] *Id.*
[108] *Id.*
[109] *Id.* § 14805(4), (5), (6).
[110] *Id.* § 14809(1)-(6).
[111] *Id.* § 14810(2).

to compliance with one or more environmental requirements and, if deficiencies are found, a plan for corrective action."[102] In order to take advantage of the Minnesota statute, the final audit document must be designated as an "audit report" and must include the date of the final written report of findings for the audit.[103]

The state must defer for at least ninety days any enforcement action against the owner or operator of a facility if a report has been submitted to the commissioner. If the report includes a performance schedule, and the performance schedule is approved, the state must defer enforcement for the term of the approved performance schedule unless the owner or operator of the facility fails to meet an interim performance date contained in the schedule.

If, within ninety days after the required report is received by the commissioner or within the time specified in an approved performance schedule, the owner or operator of a facility corrects the violations identified in the audit or self-evaluation and certifies to the commissioner that the violations have been corrected, the state may not impose any administrative, civil, or criminal penalties against the owner or operator of the facility for the reported violations. There are, of course, exceptions to this general rule. The state may at any time bring

1. a criminal enforcement action against any person who knowingly commits a violation;
2. a civil or administrative enforcement action, which may include a penalty against the owner or operator of a facility if:
   (i) less than one year has elapsed since the final resolution of a notice of violation, an administrative penalty order, or a civil or criminal lawsuit that resulted in an enforcement action being taken against the owner or operator of a facility for a violation of a requirement that was also shown as having been violated in the report; or
   (ii) a violation caused serious harm to public health or the environment; or

[102] 1996 Minn. Laws 359.
[103] *Id.*

3. the enforcement action against the owner or operator of a facility to enjoin an imminent threat to public health or the environment.[104]

§ 5.3.10 Mississippi

Mississippi enacted a limited self-evaluation privilege on April 7, 1995.[105] The statute was designed to encourage owners and occupiers of property to perform environmental audits on their private facilities. The privilege extends to civil, criminal, and administrative proceedings and will protect anyone who conducts the audit or orders others to prepare an audit. The privilege can be expressly waived. Similarly, the privilege can be lost if the regulated entity fails to come into compliance within a reasonable amount of time after discovering the violation.

The privilege does not apply to any document prepared pursuant to state, federal, or local environmental laws, regulations, or permit requirements. Similarly, the privilege does not apply to any documents that would have existed before the audit report was prepared.

The Mississippi statute provides for an in camera review of documents to determine if the privilege applies or not. The party asserting the privilege has the burden of proving its applicability. The party seeking discovery of the document, in contrast, has the burden of proving no privilege in fact exists.

§ 5.3.11 New Hampshire

On March 18, 1996, the governor of New Hampshire, in the interest of protecting the health and welfare of the public and the environment, entered into law legislation that encourages businesses to conduct environmental audits by providing an audit privilege.[106] The environmental audit privilege creates incentives for voluntary compliance with environmental laws, as it provides a limitation on the penalties that may be imposed on a business that engages in self-audits.[107]

[104] *Id.*
[105] MISS. CODE ANN. § 49-2-51 *et seq.*
[106] 1996 N.H. Laws 4.
[107] *Id.* at 4:1(II).

The New Hampshire environmental audit privilege protects the environmental audit report, which is composed of specific documents that are prepared in association with the audit, dated, and labeled "environmental audit report; privileged document."[118] Among the protected documents in the environmental audit report is a written plan that identifies the auditor, the scope of the audit, and the anticipated dates of the audit.[119] Documents generated by the auditor in the course of the audit, including those that summarize the audit findings, draw conclusions, and provide recommendations, also are contained in the privileged report.[120]

The audit privilege further extends to documents created by the auditee in response to the aforementioned materials provided by the auditor. The implementation plan prepared by the auditor, which identifies areas of non-compliance discovered in the course of the audit and recommends corrective action and preventive measures for further noncompliance, is also part of the audit report and therefore is protected by the privilege.[121]

As extensive as this privilege may appear, there are multiple exceptions to its use. The privilege does not apply when

a) it is waived, either expressly or impliedly, by the auditee.

b) it is waived by the auditee, who wishes to introduce part or all of the report as evidence.

c) the auditee fails to promptly initiate and diligently pursue actions to achieve compliance when the audit report evidences noncompliance.

d) the audit report reveals a threat of imminent and substantial harm to the public or the environment.

e) the court determines, after an in camera review, that the auditee had a fraudulent intent in commissioning the audit, or that the auditee was aware of government investigation, or that a criminal offense has occurred for which the state has a compelling need for the otherwise unavailable information.[123]

[118] *Id.* at Chapter 147-E:1(V).
[119] *Id.* at Chapter 147-E:2(I).
[120] *Id.* at Chapter 147-E:2(II).
[121] *Id.* at Chapter 147-E:2(II) - (III).
[122] *Id.* at Chapter 147-E:2(IV).
[123] *Id.* at Chapter 147-E:4(I) - (IV).

The law also excludes documents from the privilege if they are required to be available to the regulatory agency; if the regulatory agency obtains the information through its own observation, sampling, or monitoring; or if the documents are developed in the regular course of business.[124] The course-of-business exclusion includes information that may have been reviewed by the auditor, formed a basis for the audit report, or even used in the audit report.[125]

In the event that a party asserts the privilege and one wishes to contest this assertion, the court will conduct an in camera review of the environmental audit report.[126] The party opposing disclosure may file objections, a hearing may be held, and the court will issue an order regarding the status of the documents.

The New Hampshire law also provides for a penalty waiver when certain steps are followed after an audit reveals a violation.[127] There are also explicit exceptions to qualifying for a penalty waiver.[128]

5.3.12 Oregon

In 1993, the Oregon legislature also enacted a statute designed to offer a measure of comfort to executives weighing the benefits of conducting environmental audits of their businesses against the danger that audit results could be used to build a case against them, either by government agencies or private litigants.[129] Oregon's environmental audit privilege law supplements current common law privileges and is the first attempt to protect internal comprehensive evaluations of environmental performance by either business or local governments against disclosure in any state or private enforcement action. The Oregon statute provides that internal environmental audits prepared by businesses or local governments to identify areas of environmental noncompliance or to improve compliance efforts are privileged and may not be introduced into evidence in any civil, criminal, or administrative proceeding.

[124] *Id.* at Chapter 147-E:5(I) - (III).
[125] *Id.* at Chapter 147-E:5(III)(a)(b)(c).
[126] *Id.* at Chapter 147-E:6.
[127] *Id.* at Chapter 147-E:9(I).
[128] *Id.* at Chapter 147-E:9(II).
[129] 1993 Ore. Laws 422.

Oregon's audit privilege is expressly designed to "encourage owners and operators of facilities and persons . . . both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance . . ." overall. The Environmental Audit Reports are "privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding. . . ." An Environmental Audit is defined as a "voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities . . . that is designed to identify and prevent noncompliance or to improve compliance . . ." with environmental laws and regulations. The audit privilege applies only to a set of documents labeled "Environmental Audit Report: Privileged Document." The Environmental Audit Report may include a broad array of documents such as field notes, records of observations, findings, opinions, maps, charts, graphs, surveys and computer generated or electronically recorded information, provided the audit is "collected or developed" for the primary purpose and in the course of the audit. When completed, the Environmental Audit Report must have three components:

1. An audit report prepared by the auditor, including the scope of the audit, the information gained in the audit, conclusions, and recommendations, along with exhibits and appendices;
2. Memoranda and documents analyzing portions or all of the audit report and implementation issues; and
3. An implementation plan that addresses correcting past noncompliance, improving compliance, and preventing future noncompliance.[99]

The self-evaluation privilege established by the statute is by no means absolute. Many exceptions could negate the privilege. For example, the privilege applies only to a set of documents that is both labeled as an environmental audit report and tagged as privileged. The privilege also does not cover documents, data, or reports that are required by law; information an agency develops by its own observations or sampling; or information obtained from a source separate from the environmental audit.

[99] But note that the environmental audit privilege itself does not extend to
1. Documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise provided to regulatory agencies.

There are a number of other circumstances that can trigger loss of the privilege. The environmental audit privilege may be waived, either expressly or by implication, by a facility's owner or operator or the persons preparing the report. In addition, a court may require disclosure if it determines the privilege was fraudulently asserted, that it does not apply, or that the material, though privileged, shows noncompliance with environmental laws or lack of due diligence to comply. The privilege is, likewise, unavailable if the material contains information related to the commission of a crime and a prosecutor shows a "compelling need" for it and the inability to get it by other means.[100]

The party asserting the environmental audit privilege has the burden of proving the privilege, including proving that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence. Parties seeking disclosure have the burden to prove that the privilege is asserted for fraudulent purposes. A district attorney or state attorney general seeking disclosure on grounds of compelling need has the burden of proving the conditions for disclosure.[101]

§ 5.3.13 South Carolina

On June 4, 1996, the Governor of South Carolina approved the South Carolina Environmental Audit Privilege and Voluntary Disclosure Act of 1996.[102] In an effort to protect the environment, the legislation encourages owners and operators of facilities to conduct voluntary internal environmental audits by providing an audit privilege to protect

2. Information obtained by observation, sampling, or monitoring by an agency.
3. Information obtained from a source independent of the environmental audit.

[100] *See generally* James D. Lawlor, Esq., Executive Legal Alert, AIR & WATER POLLUTION REPORT (Feb. 28, 1994); W. Hugh O'Riordan, *Oregon's Environmental Audit Privilege: An Incomplete First Step Toward Encouraging Voluntary Compliance*, 5 OREGON LEGAL FOUNDATION LEGAL OPINION LETTER (Feb. 11, 1994).

[101] A district attorney or the attorney general having independent probable cause to believe an offense has been committed may obtain a privileged Environmental Audit Report through a search warrant, subpoena, or through discovery. Once obtained, the Environmental Audit Report must be placed under seal and shall not be reviewed or disclosed until after thirty days have passed. Affected parties must file a petition with the appropriate court requesting an in camera hearing or lose the privilege. Once a petition is filed, the court must schedule an in camera hearing within forty-five days.

[102] 1996 S.C. Acts 384.

communications related to the audit and by providing a limited protection from penalties in instances of voluntary disclosure.[154]

Although the majority of the legislation mirrors audit privilege legislation enacted in other states regarding assertion of the privilege, court determination of its availablity, and voluntary disclosure,[155] South Carolina also included two distinct provisions. The first enables the Workers' Compensation Commission to obtain and admit evidence from an audit report regardless of the privilege the chapter provides.[156] The second clause allows information in the audit report to be available to solicitors and the attorney general for criminal proceedings.[157] Disclosure under either of these clauses is limited to use in the specific proceeding.[158]

§ 5.3.14 South Dakota

South Dakota Governor William Janklow recently signed an environmental audit privilege bill (SB 24) into law. The law creates a presumption against the imposition of any civil or criminal penalties for violations discovered during an audit and reported to the Department of Environmental & Natural resources within sixty days of the audit. The law precludes the state from routinely requesting audits, but allows use of discovery, where appropriate.[159]

§ 5.3.15 Texas[160]

The Texas legislature adopted its own Environmental Audits statute in May 1995, proposing to encourage voluntary compliance with environmental and occupational health and safety laws.[161] Audit reports are

[154] *Id.* § 48-57-10 (A).
[155] *Id.* Environmental Audit Report is defined in 48-57-20(3); the report is declared privileged in 48-57-30(A), 48-57-50, 48-57-60; the privileged is waived in 48-57-40; and immunity for voluntary disclosure is provided in 48-57-100.
[156] *Id.* § 48-57-30(C).
[157] *Id.* § 48-57-30(D).
[158] *Id.* § 48-57-30(C)(D).
[159] *See generally Several Stat Audit Privilege Bills Advance, but Setbacks Affect Bill in Florida, Vermont*, 5 DUE DILIGENCE GUIDE (BNA) at 18 (March 1996).
[160] TEXAS REV. CIV. STAT. ANN. art. 4447cc, §§ 1 to 13 (West 1996).
[161] *Id.* § 1.

considered privileged, and are not admissible as evidence, or subject to discovery, except as otherwise provided by the act.[162] In order to facilitate the identification of an audit, each document in the audit should be labeled "Compliance Report: Privileged Document," or in a similar fashion.[163] However, failure to label documents in such a manner does not create a waiver of the privilege or a presumption that the privilege does not apply.[164] In addition, any documentation required to be collected by a regulatory agency, information obtained by the agency in person, or any information obtained by a source not involved in the preparation of the audit is considered nonprivileged.[165]

The audit privilege may be expressly waived by the owner or operator preparing the report or causing such report to be prepared. However, the waiver may be estopped if the disclosure of an audit is made pursuant to the terms of a confidentiality agreement between the preparer of the audit and a third party or if the disclosure is made to an employee or agent of the owner or operator preparing the report.[166] Disclosure may be required by the court or a competent administrative hearings official with jurisdiction over such matters through an in camera review, if the privilege asserted is suspected to be fraudulent,[167] the audit shows noncompliance with environmental laws,[168] or there is reasonable cause to suspect a criminal offense has been committed under such laws.[169] The party seeking disclosure has the burden of proving fraudulent purpose or evidence of noncompliance with the laws.[170] However, under the suspicion of a criminal act, the attorney representing the state may obtain a copy of the audit through a search warrant or criminal subpoena, and the burden rests with the owner or operator who prepared the report to request an in camera review with the proper court to determine the audit's privileged status.[171]

[162] *Id.* § 5.
[163] *Id.* § 4.
[164] *Id.*
[165] *Id.* § 8.
[166] *Id.* § 6.
[167] *Id.* § 7.
[168] *Id.*
[169] *Id.* § 9.
[170] *Id.* § 7.
[171] *Id.* § 9.

Failure to file such a petition by the owner or operator having the report prepared waives the audit's privileged status.[97]

Immunity for voluntary disclosure of a violation of an environmental law is given as to administrative, civil, or criminal penalties.[98] A disclosure is not considered voluntary, however, if the disclosure is one required by a regulatory agency as a result of a specific condition of an enforcement order or decree.[99] In addition, the immunity privilege will not apply if the subject matter of the disclosure was committed intentionally, knowingly, or recklessly by the person claiming the privilege, or an employee or agent of that person.[100] Finally, the facility seeking such a privilege must, prior to seeking the privilege, give notice to the appropriate regulatory agency of the fact that it is planning to commence an audit of the facility, specifying the portion of the facility to be audited and the time at which the audit will commence and end.[101]

[97] *Id.*

[98] *Id.* § 10. Under such, a voluntary disclosure will only be considered voluntary
1. [T]he disclosure was made promptly after knowledge of the information disclo is obtained by the person;
2. [T]he disclosure was made in writing by certified mail to an agency that h regulatory authority with regard to the violation disclosed;
3. [A]n investigation of the violation was not initiated or the violation was n independently detected by an agency with enforcement jurisdiction before t disclosure was made using certified mail;
4. [T]he disclosure arises out of a voluntary environmental or health and safety aud
5. [T]he person who makes the disclosure initiates an appropriate effort to achi compliance, pursues that effort with due diligence, and corrects the noncomplia within a reasonable time;
6. [T]he person making the disclosure cooperates with the appropriate agency connection with an investigation of the issues identified in the disclosure; and
7. [T]he violation did not result in injury to one or more persons at the site substantial off-site harm to persons, property, or the environment.

[99] *Id.*

[100] *Id.*

[101] *Id.*

§ 5.3.16 Utah[102]

The governor of Utah signed the Environmental Self Evaluation Act into law on March 20, 1995.[103] Thus, Utah too joined the growing minority of states that are determined "to enhance the environment through voluntary compliance with environmental laws; and provide incentives to voluntarily identify and remedy environmental compliance problems"[104] by enacting environmental audit privilege legislation.[105]

Information divulged in violation of the environmental audit privilege law may not be admitted into evidence in an administrative or judicial proceeding.[106] Persons divulging privileged environmental audit information are liable for all damages that are proximately caused by the disclosure.[107] In addition, persons divulging such information may be considered guilty of a class B misdemeanor, subject to a civil penalty not to exceed $10,000 and subject to penalties for contempt of court.[108]

[102] Environmental Self Evaluation Act, 1995 Ut. SB 83.

[103] The effective date of that Act is March 31, 1995. UTAH CODE ANN. § 19-7-108. Act applies to all civil and criminal judicial and administrative proceedings commenced that date. § 19-7-108.

[104] § 19-7-102.

[105] For purposes of the law, the following definitions were adopted

> "Administrative proceeding" means an adjudicatory proceeding conducted by the department or other government entity with authority to enforce any environmental law, including any notice of violation proceeding, any department proceeding listed in Section 19-1-305, or any proceeding conducted pursuant to Title 63, Chapter 46B, Administrative Procedures Act.
>
> "Environmental audit report" means any document, information, report, finding, communication, note, drawing, graph, chart, photograph, survey, suggestion, or opinion, whether in preliminary, draft, or final form, prepared as the result of or in response to an environmental self-evaluation.
>
> "Environmental law" means any requirement contained in this title, or in rules made under this title, or in any rules, orders, permits, licenses, or closure plans issued or approved by the department, or in any other provision or ordinance addressing protection of the environment.
>
> "Environmental self evaluation" means a self-initiated assessment, audit, or review, not otherwise expressly required by an environmental law, that is performed to determine whether a person is in compliance with environmental laws. A person may perform an environmental self-evaluation through the use of employees or the use of outside consultants.

[106] § 19-7-104(a)(1).

[107] § 19-7-104(a)(2). Government employees are, however, subject to Title 63, apter 30, Utah Governmental Immunity Act. *Id.*

[108] This provision accepts attorneys, court officers, and agents in pursuant of their duties.

An environmental audit report obtained pursuant to the in camera review process is considered a protected record. Department employees and attorneys may not disclose the report except in strict accordance with the provisions of that law.[164]

The person seeking disclosure of an environmental audit report in an administrative proceeding must request an in camera review of the audit by a court of record. The person seeking disclosure of the report has the burden of proving that the report is not privileged or excepted pursuant to the Utah Rule of Evidence, Rule 508. If the court determines that all or part of the environmental audit report is not privileged, then the court must order the disclosure of the nonprivileged portions of the environmental audit report. The privileged portions of the environmental audit report may not be disclosed.

The person asserting the environmental self-evaluation privilege has the burden of establishing a prima facie case of privilege.[165]

The Utah law has a testimonial privilege.[166] A person, including the person's officers and employees, who performs or assists in performing an environmental self-evaluation as defined by the Utah law cannot be examined without the consent of the person for whom the environmental self-evaluation was conducted. This rule also applies to consultants hired for the purposes of conducting the audit. The testimonial privilege may, however, be waived if the person or consultant is ordered to testify in court. Similarly, the testimonial privilege will not apply if the self-evaluations or audit report is subject to discovery or is admissible under the Utah Rules of Evidence, Rule 508.[167]

§ 5.3.17 Virginia

The Virginia law signed into law by Governor George Allen also contains a testimonial privilege.[168] H.R. 1845, sponsored by Rep.

[164] § 19-7-104. Section 4.
[165] § 19-7-106.
[166] *See* § 19-7-107.
[167] *Id.*
[168] *See* 63 U.S.L.W. 2622 (April 11, 1995); *See also* Special Report, *States Take Legislative Initiative in Encouraging Corporate Audits*, BNA STATE ENVIRONMENTAL DAILY (March 16, 1995).

Whittington Clement (D-Danville) protects companies by stating that "no person involved in the preparation of or in possession of a document shall be compelled to disclose such document or information about its contents or the details of its preparation."[169]

The environmental audit privilege in Virginia does not extend to criminal proceedings, or to cases in which such violations demonstrate a "clear, imminent and substantial danger to the public health or environment" or to self-assessments conducted in bad faith. The agency bears the burden of proving entitlement to this abrogation of the general rule of privilege. A party seeking disclosure must prove the need or applicability of an exception to have the document admitted as evidence in a legal proceeding.

The law contains a limited penalty immunity provision that is similar to the Colorado provision. Companies that discover and admit environmental violations or irregularities during a self-assessment will be immune from administrative or civil penalty for such violations that might be required under statute, regulation, or administrative order.

§ 5.3.18 Wyoming[170]

The Wyoming legislature, likewise, determined that "protection of the environment rests principally on voluntary public compliance with environmental laws." For this reason, the people of Wyoming joined the growing minority of states that determined that "limited expansion of existing privileges will encourage voluntary public compliance and will improve environmental quality," because "the voluntary provisions of this act will not inhibit mandatory exercise of the regulatory authority by those entrusted with protecting our environment."

In enacting the Wyoming version of environmental audit privilege legislation, the legislature decided to revisit the question annually. Each year after the effective date of the act, the department of environmental quality must prepare a report to the joint minerals, business, and economic development interim committee as to the effectiveness of the voluntary

[169] Special Report *States Taking Legislative Initiative in Encouraging Corporate Audits*, BNA STATE ENVIRONMENTAL DAILY (March 16, 1995).
[170] 1995 Wyo. Sess. Laws 58.

environmental audit reporting process authorized under this act and determine if the process meets purposes and findings specified in this act. The committee must report its findings and recommendations to the fifty-fourth legislature at the 1998 budget session and every two years thereafter. The act took effect upon approval by the governor and has no statutory sunset.

Owners and operators of facilities and persons whose activities are regulated under the state environmental laws may conduct a voluntary internal environmental audit of compliance programs and management systems to assess and improve compliance with this act. An environmental audit privilege is created to protect the confidentiality of communications relating to these audits.[1] The creation of this statutory privilege will not, in

[1] WYO. STAT. § 35-11-1105(b). For purposes of the statute, the following definitions apply:

(i) "Environmental audit" means a voluntary, internal and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this act, or of management systems related to the facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with this act. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees or by independent contractors. Once initiated the voluntary environmental audit shall be completed within one hundred eighty (180) days. Nothing in this section shall be construed to authorize uninterrupted voluntary environmental audits;

(ii) "Environmental audit report" means a set of documents, each labeled "Environmental Audit Report: Privileged Document," prepared as a result of an environmental audit and may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys if supporting information is generated or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, shall have three (3) components:

(A) An audit report prepared by the auditor, including the scope, commencement and completion dates of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;

(B) Memoranda and documents analyzing the audit report and discussing implementation issues; and

(C) An audit implementation plan that corrects past noncompliance, improves current compliance and prevents future noncompliance.

(iii) "In camera review" means a hearing or review in a courtroom, hearing room or chambers to which the general public is not admitted. After such hearing or review, the content of oral and other evidence and statements of the judge and counsel shall be held in confidence by those participating in or present at the hearing or review. Any

statute, "limit, waive or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege."

The environmental audit report[2] is privileged and will not be admissible as evidence in any civil, criminal, or administrative proceeding, except if the owner or operator of a facility may waive this privilege in whole or in part. If an owner or operator of a facility or person conducting an activity seeks to introduce any part of an environmental audit report as evidence in any proceeding, including reporting of environmental violations,[3] the privilege is waived as to those sections of the report dealing with that media sought to be introduced into evidence.

In a civil or administrative proceeding, the court or hearing officer after an in camera review consistent with the Wyoming Rules of Civil Procedure, may require disclosure of all or part of the report if it determines:

- ✓ The privilege is asserted for a fraudulent purpose;
- ✓ The material is not subject to the privilege;
- ✓ The material shows evidence of noncompliance with this act or any federal environmental law or regulation and appropriate efforts to achieve compliance were not initiated as promptly as circumstances permit and pursued with reasonable diligence; or
- ✓ The information contained in the environmental audit report demonstrates a substantial threat to the public health or environment

any transcript of the hearing or review shall be sealed and not considered a public record until its contents are disclosed, pursuant to this section, by a court having jurisdiction over the matter.

[2] 1105(a).

[3] The environmental audit privilege does not extend to:

(i) Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to any regulatory requirement of this act or any other federal or state law or regulation;

(ii) Information obtained by observation, sampling or monitoring by any regulatory agency;

(iii) Information obtained from a source independent of the environmental audit; or

(iv) Documents existing prior to the commencement of the environmental audit; or

(v) Documents prepared subsequent to and independent of the completion of the environmental audit.

[4] The reporting violations specified in the statute are those enumerated under WYO. STAT. § 35-11-1106(a).

or damage to real property or tangible personal property in areas outside the facility property.

In a criminal proceeding, the court may require disclosure, after in camera review, of all or part of the report if it determines any of the four enumerated conditions justifying disregarding the audit privilege in the civil context exists or the material contains evidence relevant to the commission of a criminal offense under state or any federal environmental law. If the district attorney or the attorney general has a need for the information, the information is not otherwise available, and the district attorney or attorney general is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay, then the privilege may likewise be disregarded.

The party asserting the environmental audit privilege has the burden of proving the privilege, including proof that appropriate efforts to achieve compliance with state or federal environmental law or regulation were promptly initiated and pursued with reasonable diligence. A party seeking disclosure of an audit has the burden of proving that the privilege is asserted for a fraudulent purpose. A district attorney or the attorney general seeking disclosure for purposes of proving criminal conduct has the burden of proving the specified conditions for disclosure.

A district attorney or the attorney general, having probable cause to believe an environmental crime has been committed under Wyo. Stat. § 35-11-901 based upon information obtained from a source independent of an environmental audit report, may obtain a report for which a privilege is asserted under this section pursuant to a search warrant, criminal subpoena or discovery. The district attorney or the attorney general must immediately place the report under seal and must not review or disclose its contents.

Within twenty days after the district attorney or the attorney general has obtained an environmental audit report, the owner or operator of the facility in which the report was prepared may file with the appropriate court a petition requesting an in camera hearing on the privilege or confidentiality of the environmental audit report. Failure by the owner or operator to file the petition will waive the privilege.

Upon filing a petition, the court must within thirty days after filing the petition issue an order scheduling an in camera hearing to determine if the environmental audit report is privileged under this section or subject to disclosure. The order must allow the district attorney or the attorney general to review the report and must place appropriate limitations on distribution

and review of the report to protect against unnecessary disclosure. The district attorney or the attorney general may consult with appropriate law enforcement agencies regarding the contents of the report as necessary to prepare for the in camera hearing.

Information used in preparation for the in camera hearing cannot be used in any investigation or in any proceeding against the defendant and must otherwise be kept confidential, unless the information is found by the court to be subject to disclosure. Upon making a determination pursuant to an in camera review, the court may compel disclosure of those portions of the environmental audit report relevant to issues in dispute in the proceeding.

The parties may at any time stipulate to entry of an order directing whether specific information contained in an environmental audit report is subject to the environmental audit privilege.

If an owner or operator of a facility regulated under this act voluntarily reports to the department a violation disclosed by the audit conducted under Wyo. Stat. § 35-11-1105 within sixty days of the completion date of the audit, the department must not seek civil penalties or injunctive relief for the violation reported,[71] unless one of four criteria are found:

(i) The facility is under investigation for any violation of this act at the time the violation is reported;

(ii) The owner or operator does not take action to eliminate the violation within the time frame specified in an order affirmed by the council or otherwise made final pursuant to Wyo. Stat. § 35-11-701(c)(ii);

(iii) The violation is the result of gross negligence or recklessness; or

(iv) The department has assumed primacy over a federally delegated environmental law and a waiver of penalty authority would result in a state program less stringent than the federal program or the waiver would violate any federal rule or regulation required to maintain state primacy.[72]

[71] § 35-11-1106(a) (Limitation on civil penalties; voluntary reports of violations).

[72] If a federally delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation will, to the extent allowed under federal law or regulation, be considered a mitigating factor in determining the penalty amount.

The penalty immunity provisions of the law do not prevent a cause of action for injunctive relief under Wyo. Stat. § 35-11-115.

Reporting a violation is mandatory if required by state law, an departmental rule or regulation, federal law or regulation, local ordinance or resolution, any order of the council, or by any court. Thus, mandatory reporting is not considered "voluntary" for purposes of the environmental audit privilege law.

The elimination of administrative or civil penalties under the environmental audit privilege law does not apply if a person or entity has been found by a court to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders of consent and that were due to separate and distinct events giving rise to the violations, within the three-year period prior to the date of the disclosure. A pattern of continuous or repeated violations may also be demonstrated by multiple settlement agreements related to substantially the same alleged violations concerning serious instances of noncompliance with environmental laws that occurred within the three-year period immediately prior to the date of the voluntary disclosure.

§ 5.4 Pending Federal Legislation

Representatives Hyde (R-Ill.), Hefley (R-Colo.), and DeLay (R-Tex.) introduced environmental audit privilege legislation into the House of Representatives on February 24, 1995.

Senator Mark Hatfield (R-Ore.) is expected to reintroduce a version of S.2371 in Congress along with Senator Brown (R-Colo.) as a cosponsor.

§ 5.5 Other State Audit Legislation

Some states have enacted legislation that encourages environmental audits but does not expressly provide an audit privilege. Below are brief descriptions of some of these statutes.

§ 5.5.1 California

California provides certain financial incentives for those who conduct audits. For example, California law makes certain loan programs available

to owners of USTs that need to upgrade their tanks.[176] In order to make application for such financing an applicant must complete a loan application[177] which includes an environmental audit.

Other means the California legislature has used to encourage environmental audits include endorsing the use of environmental quality assessments,[178] which are also called environmental audits, and recommending "that state and local governments initiate programs to encourage the broader use of the assessment process, and while the state should take steps to actively encourage the private sector use of environmental assessments, it is not the intention of the Legislature to require that any person or business utilize environmental assessors."[179] The legislature explained:

> Environmental assessments can encourage voluntary compliance with both the letter and the spirit of the law as well as encourage cost-effective process improvements. By reducing potential liability, assessments can reduce the long-term costs of hazardous substance management. In addition, the use of assessments can help to build public confidence that hazardous substances are being managed in an increasingly safe manner. The use of independent environmental assessments is an important emerging feature of specific state hazardous substance management programs.[180]

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[176] CAL. GOV'T CODE § 15399.13 (1993) (Operative until January 1, 1998).

[177] *Id.* The statutes requires three of the following must be provided:
(a) Evidence of eligibility.
(b) An environmental audit, as specified in Section 5268 of Title 10 of the California Code of Regulations.
(c) Financial and legal documents necessary to demonstrate the applicant's ability to repay and provide collateral for the loan. The department shall develop a standard list of documents required of all applicants, and may also request from individual applicants additional financial and legal documents not provided on this list.
(d) An explanation of the reasons the project tank is not in compliance with applicable local, state, or federal standards, and evidence that tanks not included in the list of project tanks are currently in compliance with applicable local, state, or federal standards.
(e) A detailed cost estimate of the tasks which are required to be completed in order for the project tanks to comply with applicable local, state, or federal standards.
(f) Any other information which the department determines to be necessary to include in an application form.

[178] CAL. HEALTH & SAFETY CODE § 25570(b)(1)(1993).

[179] CAL. HEALTH & SAFETY CODE § 25570 (1993).

[180] *Id.* (2).

The legislature noted that "many of California's major business have internal environmental assessment programs. Larger firms often maintain in-house staffs."[181] Thus, the legislature directed the state agencies to "provide a list of registered independent third-party assessors for use by small- and medium-sized firms seeking technical assistance to achieve and maintain regulatory compliance."[182]

The California legislature then created a modified self-evaluation privilege that states that:

> . . . Notwithstanding any other provision of law, the findings of an environmental audit or assessment conducted by or for a small business pursuant to this section shall remain the property of the business.[183]

On February 16, 1996, California issued a new proposed policy on environmental audits that was designed to expand and clarify the California law with the new U.S. EPA guidance.[184] The California EPA issued its final policy on Incentives for Self Evaluation (Policy) on July 8, 1996. Designed to encourage due diligence and self-policing, self-disclosure, and correction, the policy provides a variety of incentives for regulated entities that are "good actors" and meet specific conditions. Incentives include gravity-based penalties, reduction of gravity-based penalties by 75%, criminal recommendations, and no routine request for audits.

The California EPA Policy, however, goes beyond the U.S. EPA audit policy by offering a fee-for-service certification program. This program would allow companies, for a fee, to have California EPA conduct a review of the corporation's audit or due diligence program and certify it as meeting the requirements of the policy. This addition is designed to reduce uncertainty many corporations feel concerning use of internal audits in prosecution.

[181] *Id.* (3).
[182] *Id.* (4).
[183] *Id.* The definition of "small business," for the purposes of this section, was the same as that of the federal Small Business Administration.
[184] *See generally California Unveils Draft Audit Policy That Expands On, Clarifies U.S. EPA Approach*, 5 DUE DILIGENCE GUIDE (BNA), at 19-20 (March 1996).

§ 5.5.2 New Jersey[185]

New Jersey law protects a foreclosing lender from liability under its state equivalent of CERCLA by allowing, but not requiring, the foreclosing lender to perform an environmental audit, which must then be forwarded to the Department of Environmental Protection. Upon receipt of the audit, the department must, within ninety days, transmit its finding to the holder. The department can charge "reasonable fees and adopt any additional regulations necessary to provide guidelines for the submission and review of such audits."

§ 5.5.3 New Mexico[186]

New Mexico law defines "environmental audit" as "a systematic assessment, analysis and evaluation by a regulated entity[187] of its compliance with environmental laws and regulations" administered by the environmental improvement board[188] and the environmental improvement division of the health and environment department,[189] "applicable to its operation."[190]

The law requires that no regulations may be adopted pursuant to the Environmental Compliance Act until after a public hearing is held.[191] For purposes of this law, "regulation" is defined as including

> any amendment or repeal thereof. Hearings on regulations shall be held pertaining to that environmental area which is substantially affected by the regulation. In making a regulation, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the hearing, including but not limited to:

[185] 1993 N.J. Laws 112.
[186] N.M. STAT. ANN. § 74-7-3 (1993).
[187] "Regulated entity" means any person, partnership, corporation, firm, association, governmental or other entity organized and engaging in any business or activity in the state which deals with or has an impact on the environment of this state or which must by law comply with federal or state environmental protection regulations. *Id.* § 74-7-3(E).
[188] *Id.*
[189] *Id.* § 74-7-3(C).
[190] *Id.* § 74-7-3(D).
[191] N.M. STAT. ANN. § 74-7-5 (1993).

1. the protection of the health and welfare of both the general public and the individual worker and the maintenance of the delicate ecological balance;
2. the necessity for and technical practicability and economic reasonableness of taking action with respect to environmental auditing programs;
3. the need to protect private proprietary processes;
4. the level of management support within the specific regulated entity for the environmental auditing program;
5. a regulated entity's established procedures to ensure compliance and correction of any environmental standards that are violated; and
6. compliance with the requirements of the following federal laws and their associated standards, regulations and state implementing directives:
   (a) the National Environmental Policy Act of 1969;
   (b) the Federal Water Pollution Control Act;
   (c) the Safe Drinking Water Act;
   (d) the Resource Conservation and Recovery Act of 1976;
   (e) the Used Oil Recycling Act of 1980;
   (f) the Clean Air Act;
   (g) the Toxic Substances Control Act;
   (h) the Occupational Safety and Health Act of 1970;
   (i) the Noise Control Act of 1972;
   (j) the Hazardous Materials Transportation Act; and
   (k) the Comprehensive Environmental Response, Compensation and Liability Act of 1980.[92]

[92] Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, time and place of the hearing and the manner in which interested persons may present their views. The notice shall state where interested persons may secure copies of any proposed regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings. Id. § 74-7-5(B).

At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing, pertaining to the feasibility of conducting environmental audits. *Id.* § 74-7-5(C)

No regulation or amendment or repeal thereof adopted by the board shall become effective until thirty days after its filing pursuant to the State Rules Act [14-3-24, 14 NMSA 1978, 14-4-1 to 14-4-9 NMSA 1978]. *Id.* § 74-7-5(D)

Any person who is affected by a regulation adopted by the board may appeal to the court of appeals for further relief. All appeals shall be upon the transcript made at the hearing

§ 5.5.4 Pennsylvania

Section 507(a) of the CAA sets forth seven requirements that states must meet to have an approvable small business assistance plan (SBAP).[93] Two of these requirements require that the state consider environmental audit protocols in the establishment of the SBAP programs. Pennsylvania agreed to meet the second of these seven requirements through the outreach and audit programs. According to the state, pamphlets will be distributed containing information regarding accidental release prevention and pollution prevention. In addition, pollution prevention and accidental release information will be provided during onsite audits, which may be requested by the small businesses.[94]

In addition, the fifth requirement (to develop adequate mechanisms for informing small business stationary sources of their obligations under the CAA, including mechanisms for referring such sources to qualified auditors or, at the option of the state, for providing audits of the operations of such sources to determine compliance with the CAA) was met by the state of Pennsylvania by planning to maintain a toll-free telephone line to allow easy access to information regarding federal and/or state requirements.[95] In meeting this requirement, the state will also inform affected small businesses, in a timely manner by certain proactive mechanisms, and will provide material, through the outreach portion of the program on environmental audits, to assist small businesses in meeting the requirements of CAA. Under the plan in Pennsylvania, the "environmental audit will determine applicable requirements, compliance status, control options and pollution prevention alternatives."[96]

shall be taken to the court of appeals within thirty days after filing of the regulation pursuant to the State Rules Act. *Id.* § 74-7-5(E).

[93] Sections 7.7 through 7.9 of the 1992 Pennsylvania Air Pollution Control Act, authorize the establishment of a Small Business Assistance Program which meets the requirements of section 507 of the CAA. In developing the Program submittal, the Commonwealth delegated the majority of its functions to the Department of Environmental Resources (DER).

[94] 60 Fed. Reg. 1738 (Jan. 5, 1995) (Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania Small Business Assistance Program) (Final rule).

[95] 60 Fed. Reg. 1738, 1739.

[96] *Id.* at 1740.

§ 5.5.5 Rhode Island[97]

Rhode Island law states that in order to incur owner or operator liability under the state Superfund act the person must "participate . . . in the management." The statute defines "participating" or "participate" "in the management of a dwelling, dwelling unit or child care facility" as the actual participation by a holder in the management or operational affairs of a dwelling, dwelling unit, or child care facility, without limitation where a holder exercises control at a level comparable to that of a manager of the enterprise with responsibility for day-to-day decision making with respect to all or substantially all of the operational (as opposed to financial or administrative) aspects of the dwelling, dwelling unit, or child care facility.

According to the legislature, conducting, or requiring the borrower to conduct, an environmental assessment or audit of the dwelling, dwelling unit, or child care facility will not, in and of itself, constitute participation in the management of a dwelling, dwelling unit, or child care facility.

[97] R. I. GEN. LAWS § 130-A:1 (1993).

Environmental Self-Regulatory Organizations and the Environmental Report Card

§ 6.1 Overview of the Environmental Report Card Concept

The concept of companies voluntarily producing an "environmental report card" that they disclose to the public has become increasingly popular.[1] Some of these programs require that management complete the report card. Others require that outside auditors do the environmental evaluation.

[1] For a discussion of consumer reliance on voluntary codes of environmental and other social corporate conduct, *see* James S. Hoyte, *Comments on Safoff's Environmentalism As Populism*, *in* W. MICHAEL HOFFMAN ET AL., BUSINESS ETHICS AND THE ENVIRONMENT: THE PUBLIC POLICY DEBATE (1990).

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
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Office of the President
October 24, 1997

Honorable John H. Chafee
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Chairman Chafee:

As the President of the National District Attorneys Association I want to reemphasize our opposition to the concept of an "environmental self audit privilege" as contained in legislation before the Senate. We continue to believe that this is an extreme measure far beyond any remedy necessary and, that if you enact a self-audit privilege, you will be doing a vast disservice to law enforcement efforts not only in the realm of environmental law, but across the spectrum of "white collar" crime.

A privilege in criminal law is a protection not lightly given nor, from the prosecutors perspective, easily overcome. Privilege under criminal law has only been given to entities, which in the eyes of the law, have a magnitude of importance to our society vastly outweighing all criminal offenses. To maintain that the interest of the business community in protecting corporate records concerning environmental compliance is on a par with the sanctity of the spousal or priest-parishioner privilege is sheer hyperbole.

To the prosecutor there are two very distinct and practical problems with enacting an environmental privilege. Because of the highly technical nature of many environmental offenses, and because of the structured management levels found in most corporations, the elements of knowledge and intent become paramount in any decision by a prosecutor to bring criminal charges either against the corporate entity or individuals within the corporation. Records of the corporation would provide the information necessary to make this determination. If access is denied on the basis of privilege the prosecutor would either have to fully engage the criminal and appellate court systems to gain access to the records to even determine if a crime has been committed or forgo prosecution altogether. The first is a patent waste of precious assets and time, while the second is a breach of our public trust.

Even if charges are brought, without use of any privileged information, the possibility of inadvertent taint during the criminal investigation, and any subsequent trial, presents a

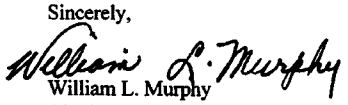
difficult, if not insurmountable, task for law enforcement. Further, a privilege afforded this segment of corporate America, can only trigger demands for comparable protection by other elements of the business world with self-evaluating procedures. Before protection from criminal responsibility is granted to one portion of the business community, it would be prudent to fully understand the ultimate consequences.

Mandating a criminal privilege or immunizing an entity from criminal prosecution provides an extremely potent protection and should not be undertaken lightly; particularly when less restrictive remedies are available. Granting relief from mandated punishments, permitting self-evaluations and reporting to be used in mitigation or extenuation, or permitting use of corporate records as an affirmative defense are all less onerous forms of recognizing the value of self-audits and encouraging their widespread use.

The Congress has delineated the criminal offenses necessary to protect our environment, has set the standards and mandated the appropriate punishments. To now handicap the efforts of law enforcement, whether at the federal, state or local level, to enforce these standards is little short of hypocritical.

We would urge you to continue to review less onerous methods of encouraging self audits and seeking more reasonable methods to enhance voluntary compliance with environmental standards.

Sincerely,



William L. Murphy
District Attorney, Richmond County (Staten Island), New York
President, National District Attorneys Association

NEW YORK STATE,
DISTRICT ATTORNEYS ASSOCIATION,
Kew Gardens, NY, October 28, 1997.

Hon. JOHN H. CHAFEE,
Chairman, Environment and Public Works Committee,
U.S. Senate, Washington, DC.

RE: ENVIRONMENT AND PUBLIC WORK COMMITTEE HEARINGS ON VOLUNTARY AUDITS TO BE HELD ON OCTOBER 30, 1997

DEAR SENATOR CHAFEE: Thank you for the opportunity to present written testimony to the Environment and Public Works committee on behalf of the New York State District Attorneys Association (NYSDAA) and the 62 elected district attorneys whom it represents.

As President of the Association, I urge that the Committee carefully consider the unintended consequences of the proposed Environmental Protection Partnership Act (Senate 866). If enacted, the Act would, in our judgment, cause serious harm to those whom it is intended to protect and would intrude upon the right of our States to enact and enforce their own laws.

PROVISIONS OF THE ENVIRONMENTAL PROTECTION PARTNERSHIP ACT (SENATE 866)

The proposed Environmental Protection Partnership Act (EPPA) has two major components, each of which would shield criminal activity. Taken together, they would create a haven for criminal conduct on the part of industry, environmental service providers and even government employees.

Privilege Provisions

The first component of the proposed Act creates a very broad privilege for environmental audit reports. In effect, it creates a corporate fifth amendment privilege in the environmental arena. where no such Federal or State corporate privilege exists in other areas. The Act makes audit documents inadmissible in evidence and exempt from discovery. The privilege creates a cloak of secrecy around a host of items which are not protected by any traditional privilege: personal observations, scientific tests, field analysis, laboratory results, photographs, graphs, and other empirical data; expert testimony and opinions; recommendations; and documents which describe the scope and methodology of the audit. The privilege also limits testimony by those who participated in an audit.

The privilege cloak keeps government in the dark about an audit even if the company voluntarily shares that audit with a lender, buyer, potential business associate, or competitors. The privilege shield, with very limited exceptions, would equally thwart efforts of prosecutors, grand juries, government lawyers, regulatory agencies, citizens' groups and next door neighbors to learn the truth about an environmental violation.

Immunity Provisions

The proposed Act would grant criminal, civil and administrative immunity to companies and officers without the consent of or notification to State or Federal prosecutors. Any company which makes a "prompt" disclosure of a violation to a State or Federal environmental agency, setting forth plans for any necessary remediation would receive an automatic presumption of immunity from prosecution ("disclosure immunity").

If the regulatory agency does not dispute the disclosure immunity within 60 days, the immunity is conclusive. In considering whether to dispute a disclosure immunity, the agency has no right to see the audit documents giving rise to the disclosed violation. Those documents, including the empirical data, remain privileged and inaccessible except to the extent a company chooses to share it.

To dispute the immunity, the agency must establish that the company was repeatedly found guilty of distinct violations based on the exact same legal requirements, with different underlying causes, during the three preceding years. Other criminal acts or different environmental violations are not a basis for denying immunity.

Assuming a prosecutor learns about a disclosure, and convinces the agency to dispute the immunity due to an ongoing criminal investigation, the question of immunity cannot be resolved until the criminal charges are filed. In the criminal proceeding, the prosecutor must prove to the court beyond a reasonable doubt that the defendant was not entitled to immunity-by showing the same pattern of repeat violations, or an elevated intent to actually violate the applicable laws. The audit documents cannot be reviewed by the prosecutor to develop evidence of the enhanced intent.

Background

In January 1995, the NYSDAA unanimously adopted a resolution opposing environmental self-audit privilege and immunity laws. This resolution was adopted after members of our Environmental Subcommittee had participated in formal working groups negotiating sessions, debates and public hearings on voluntary audits and compliance initiatives.

For more than 3 years, we have successfully opposed privilege and immunity legislation introduced in New York State. New York State Governor George E. Pataki and its Attorney General Dennis C. Vacco have also rejected such legislation. Meetings with our State business community, professional auditing associations and other privilege proponents have convinced us that there are more effective ways to address industry complaints and encourage compliance.

THE FOCUS OF THE AUDIT PRIVILEGE/IMMUNITY DEBATE

Testimony favoring audit legislation in previous congressional hearings has focused on the complex, sometimes burdensome environmental regulations with which industry must comply. Proponents have claimed unfair treatment by regulatory agencies, and suggest that environmental violations in this era are largely technical in nature. Privilege and immunity laws would offer companies protection from both government enforcement actions and private party litigation.

The United States Department of Justice and the National District Attorneys Association have consistently opposed enactment of environmental self-audit privilege and immunity laws. If Senate 866 were enacted it would shroud important evidence in secrecy and shield from prosecution the most serious of offenders. These offenders are not "technical" violators.

Throughout our State, drums of hazardous waste are dumped in our woods and streams; stolen tractor trailers full of hazardous waste from other jurisdictions are abandoned in our industrial parks; tanker trucks dump waste on our highways and in our town landfills; generators pay unlicensed truckers cash to take their waste without manifests; manufacturers intentionally dump industrial waste into cesspools and storm drains to leach into our water supplies; and greedy environmental contractors defraud government of millions of dollars doing shoddy asbestos and lead abatement in our poorest neighborhoods and schools.

These intentional violators are the most likely to perform sham audits, make self-serving disclosures and benefit from both the privilege and immunity aspects of the law.

THE UNINTENDED CONSEQUENCES OF SENATE 866

The Impact of Privilege on Public Safety

The privilege is too broad and the exceptions do not allow government access to audit documents when they are needed to protect public health, safety and the environment:

• Emergency responders trying to contain an active spill or determine a cause of physical injury would be denied access to documents necessary to limit environmental depredation or save lives.

• A grand jury or government agency conducting an investigation into workplace injuries or fatalities would be denied access to documents which might reveal management's knowledge of dangerous conditions. There is no provision in the Act to balance public safety against rights of private parties, such as exist in other areas of the law. For example, hospitals are encouraged to review deaths in their facilities to improve procedures and prevent similar occurrences. Those reviews are not accessible to plaintiffs suing for wrongful death, but are available to government agencies which license doctors and hospitals and to grand juries investigating whether the death constituted a homicide. Under the EPPA, evidence necessary for the government to prevent future threats to public safety would remain secret.

The Privilege Exceptions are Too Narrow

Circumstances in which audit related documents are relevant to criminal investigations are not contemplated by the Act. This legitimate need for information does not satisfy the narrow privilege exceptions.

• When an environmental service provider such as a hazardous waste hauler defrauds an unsuspecting company by charging for lawful disposal services, and then illegally dumps the company's waste, audit documents may be necessary to make a criminal case against the hauler. The privilege exceptions do not allow the government to obtain those documents to prove the hauler knew the waste it dumped was hazardous.

• When a business is investigated for its current illegal activities, any audit conducted prior to the activities under investigation would be relevant to prove knowledge and intent in the current case. The narrow privilege exception would not give prosecutors access to those previously generated documents if the illegal acts were discontinued when first discovered, even if the company consciously resumed illegal dumping activities for financial motives after receiving immunity.

• Audit documents from one company would not be available under the Act to prove criminal activity of another company. Where there is hidden ownership or where a shell corporation operates a facility, audit documents from any number of companies may establish criminal intent of a particular individual. The limited privilege exceptions would prevent government from piercing corporate veils to prove an ongoing course of criminal environmental violations.

• The privilege exceptions are applied on a case by case basis under the Act. Where there is organized criminal activity, it is necessary to review patterns of activity and develop circumstantial evidence of intent. The limited exceptions do not allow a review of a company's ongoing course of conduct and do not make audit information available to prosecute crimes which may be peripheral to environmental performance.

The Immunity is Too Broad

The prosecutor's obligation to balance individual needs against public safety in resolving criminal cases is nullified by the automatic immunity provisions of the proposed Act. The immunity provisions are too broad because they do not take into account any of the following:

• The seriousness of the offense, extent of environmental damage, potential harm to health of the community.

• Whether remediation has been completed as planned by the company at the time immunity was granted.

• Whether the immunized activity was a major or minor violation, whether the company violated other environmental laws in addition to the one for which a disclosure immunity is claimed, or whether the management has committed other non-environmental crimes such as perjury or defrauding the government.

• Whether the company can benefit and is willing to participate in government assisted compliance efforts to improve overall performance.

• Whether the audit activity giving rise to the disclosure was appropriate to the size and nature of the facility, professionally conducted, accurate in its findings and likely to prevent future violations.

The Combined Impact of Immunity & Privilege Provisions

The sunset provision of the proposed Act suggests that the impact of EPPA would be scrutinized by Congress before extending it. However, the secrecy and automatic immunity provisions would prevent any scrutiny at all.

• There is no way to measure whether a particular immunized act or the program itself has actually helped or harmed public health, safety or the environment. There is no means of determining whether remediation has been completed or future violations prevented.

• There is no penalty for a company that hides evidence of undisclosed crimes, and no way to revoke immunity if illegal conduct is resumed subsequent to the grant of immunity.

• Crucial evidence would not be available if a grand jury is investigating a public servant for bribery or other misconduct in office. There is no way to scrutinize the activities of regulators who administer the programs created by the proposed Act. Once immunity is granted to the company even if the company bribed a regulator not to dispute disclosure immunity-a grand jury cannot obtain copies of audit documents to indict, to determine where the process failed or even to recommend legislative change. This protects from scrutiny the very employees of regulatory agencies who are charged with administering environmental programs, even if they are suspected of unlawfully disclosing proprietary information from an audit document to a company's competitors.

• Because there is no review process, there is no incentive for companies to conduct good audits. In fact, the promise of immunity may well encourage sham audits by criminally motivated manufacturers and unqualified or fraudulent auditors.

The District Attorneys of New York State are attuned to the needs of businesses in our respective jurisdictions and like all elected officials we are interested in the economic well-being and ability of those businesses to survive. We will work with them—and renew our commitment to work with you—to devise solutions for some of the very real problems raised by industry regarding how it is regulated. However, our primary responsibility as prosecutors is to protect the health and safety of our

citizens. Enactment of environmental self-audit privilege and immunity laws, where none exist with respect to other business relationships, will seriously impede our ability to do so.

Very truly yours,

RICHARD A. BROWN,
President.

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION
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October 24, 1997

The Honorable John Chafee
United States Senate
505 Dirksen Senate Office Building
Washington, DC 20510-3902

Dear Senator Chafee:

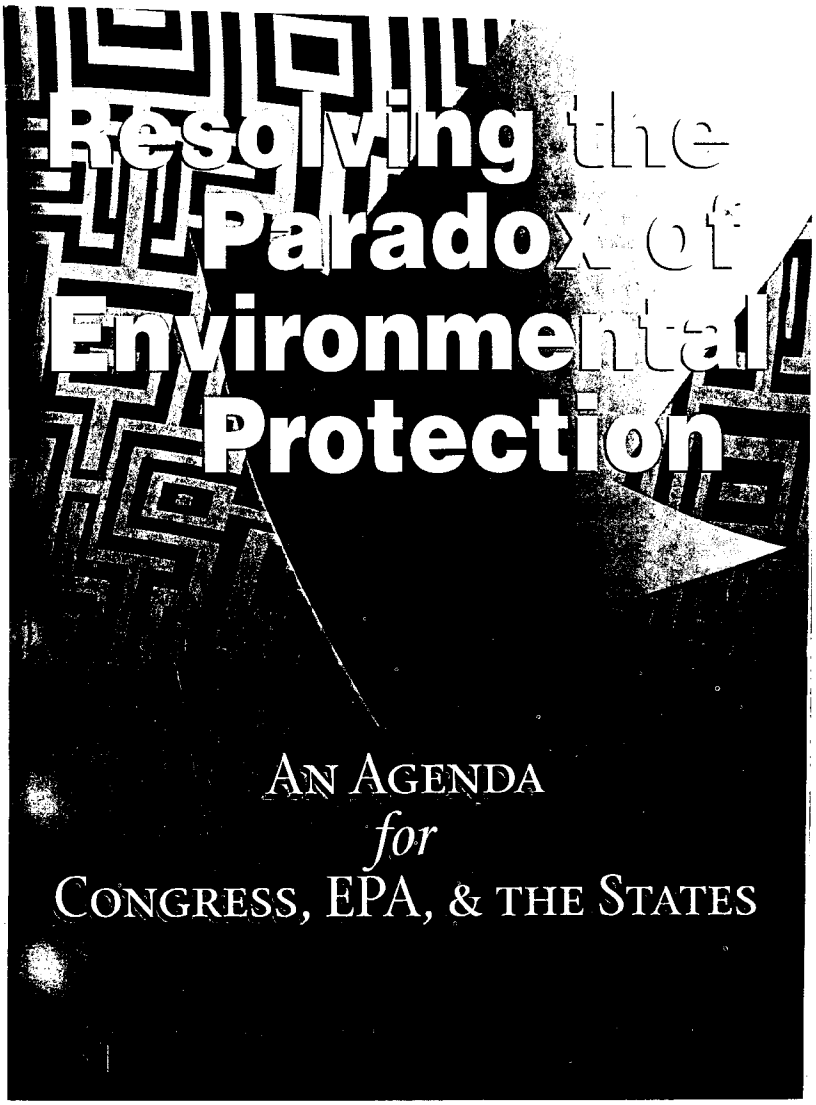
We understand that the Committee on Environment and Public Works will be holding a hearing on audit programs next Monday, October 27. Mr. Tom Gibson has suggested that we might want to submit information to the committee for the record. Enclosed are excerpts from a September 1997 Academy report, prepared at the direction of Congress, on the Minnesota environmental audit program and more generally about how governments can encourage and assist firms to establish effective environmental management systems.

We hope these materials are helpful to the Committee and appreciate the opportunity to provide them to you. If we can be of service in any other way, please do not hesitate to let us know.

Sincerely yours,

DeWitt John, Director
Center for the Economy and the Environment

cc: Mr. Tom Gibson


Resolving the Paradox of Environmental Protection
An Agenda for Congress, EPA, & the States

- in the longer run, "the stock of existing regulation (rather than simply the flow of new regulation) must be targeted for market-based approaches, and the political opposition to tax charges must be addressed."

The Enterprise for the Environment's steering committee stressed the critical importance of better aligning the nation's taxing and spending policies with environmental goals. Among the options E4E stakeholders considered were:

- establishing federal commissions to develop packages of changes in taxes and subsidies to promote environmental protection
- increasing use of emissions trading systems where technically feasible and ethically appropriate
- changing the tax treatment of employee parking spaces to eliminate one of the disincentives to public transportation
- charging higher tolls on roadways during rush hours to reduce traffic congestion

Finding

2.10 In many situations, market-based instruments have clear advantages over more prescriptive environmental policy tools. As with the Minnesota audit program described in the next section, the market tools described here are likely to be most effective in a system in which regulators and the public view businesses, communities, and even consumers not as "polluters," a role that has a connotation of criminality and indifference to social needs, but rather as rational actors trying to perform responsibly within a complex and dynamic context of regulations, social expectations, and competitive forces. Businesses and government officials will have to work together over a number of years to effect that change in attitudes and to make market-based strategies one of the first approaches considered when society decides to address an environmental problem.

Audits, Environmental Management Systems, and Other Mechanisms to Ensure Compliance and Enhance Environmental Protection

The slow progress of Project XL, the Common Sense Initiative, and market-based strategies draws attention to one aspect of the problem of environmental management in the United States: many firms have not figured out how to make environmental management a part of their business strategies.[38] Several government programs and a variety of private initiatives are trying to enhance the environmental performance of businesses by increasing their understanding of their environmental effects. EPA and several states are trying to encourage firms to audit their environmental compliance and fix the problems they discover. As more firms come into compliance, the regulatory agencies are able to focus their traditional inspection and enforcement programs on the bad actors. At the same time, EPA, states, and the International Organization for Standardization are encouraging firms to adopt formal environmental management systems to monitor their performance, ensure compliance, and discover opportunities for pollution prevention and cost savings.

Broader use of compliance audits and environmental management systems could significantly improve the nation's environment. If used in tandem, the two approaches could help transform the relationship between regulated entities, government, and the community. Experience in Minnesota supports that conclusion.

In 1995 the Minnesota Legislature passed the Environmental Improvement Act[39] to encourage companies to uncover and correct their violations of state environmental regulations. That legislative action was a response to a national business campaign for "audit privilege and immunity" legislation. Minnesota rejected the call for strict privilege and immunity, however, and adopted legislation that differs in many important respects from laws passed in other states. For one thing, Minnesota's environmental organizations participated in its drafting and support it today.

The act is a pilot program that will expire after four years, giving the regulated community and the Minnesota Pollution Control Agency (MPCA) a chance to test each other's commitment to the program. If either party abuses the public trust extended in the statute, the legislature could simply let the initiative die. As detailed in Case Study 3 of this report, Minnesota's small businesses are responding to the law's self-inspection incentives in ways that suggest that the state has found an effective, nonconfrontational tool for bringing firms into the regulatory system for the first time, thus improving the environmental performance of small, dispersed sources of regulated pollutants.

The law is an attempt to remedy what many companies see as a disincentive to better management: the possibility that a company's own evaluation of its environmental performance could be published or used against it as evidence in a criminal or civil proceeding. Business organizations nationwide argue that such possibilities encourage many executives to adopt a "what-we-don't-know-can't-hurt-us" attitude, even though such willful ignorance may cause environmental damage and perpetuate sloppy management. What was needed, national business groups argued, were state and federal statutes that would make internal environmental audit reports privileged information that public agencies and citizens would have no right to see or use in an enforcement action, as well as a guarantee of immunity from prosecution for violations firms uncovered in audits and then fixed.

As mentioned above, Minnesota's law does not grant immunity or privilege as a right, but it does provide firms and public agencies with a reasonable expectation that if they act in good faith, the state will not punish them for uncovering environmental problems. The law directs the state not to penalize firms or public agencies for violations uncovered during environmental audits or self-evaluation if they are reported to MPCA in writing and the disclosure is accompanied by a schedule to eliminate them within 90 days.[40] Neither does the statute provide evidentiary privilege, but it does protect privacy rights by allowing program participants to file audit summaries, rather than the detailed reports themselves. While state enforcement officials do have access to the underlying reports, companies are protected from third parties unless they have failed to report or correct violations. The statute does not grant general immunity from prosecution or fines, but it does defer enforcement and restrict sanctions. The state retains the right to bring criminal actions against people who knowingly commit serious environmental crimes. The state may also take civil or administrative action against those who are repeat offenders or who cause serious harm to public health or the environment. No firm that has been fined for violations within the previous year may participate in the audit program. Larger firms applying for the program must also prepare a pollution-prevention plan and submit annual progress reports to qualify for the state deferment of enforcement.

The Minnesota statute authorizes the MPCA to award a "green star" to any eligible company that completes the process of auditing, reporting, and fixing problems. Companies

may display the star as a public sign of their commitment to environmental compliance. The drafters intended the green star program to be a commercially valuable incentive to get firms into the program.

The Minnesota statute is similar in many respects to the U.S. EPA's own policy on environmental audits,[41] which states that the agency will reduce or waive fines for firms that identify, self-report, and correct problems, and meet the conditions of the policy. EPA's Office of Enforcement and Compliance Assurance is concerned about areas in which it believes Minnesota's law may diverge from the federal policy, limit the public's access to information, and constrain the state's ability to enforce federal laws.[42] EPA and the Department of Justice have strongly opposed state laws that have granted either privilege for audits or immunity from prosecution to firms that find problems through audits when the laws lack corresponding safeguards to protect public health and the environment.

Minnesota's audit statute appears to be doing what its framers intended. As of April 25, 1997, the agency had sent approximately 700 audit packages to regulated entities and others, and received 253 reports back.[43] In the two months that followed, MPCA mailed out 4,500 more packages, nearly all of them to auto body and auto repair shops handling regulated CFCs for air-conditioning units. The CFC mailings generated audit reports from 204 companies. As of June 25, 1997, MPCA had received 515 reports, 511 of them from minor facilities. Approximately 75 percent of the reports identified problems that the firms said they had fixed or would correct.[44]

In its June 25, 1997, *Environmental Audit Program Update*, the agency noted: "No criminal violations have been identified in these reports, and no enforcement action has been taken against any of the participants." To the contrary, the agency had awarded 108 green stars to the participants and expected to issue 14 more soon.

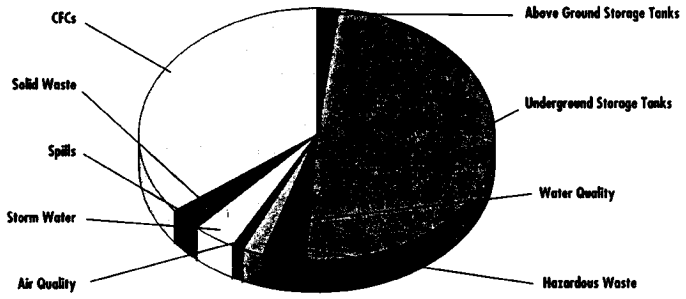
As those statistics indicate, small businesses, particularly those with underground storage tanks or CFC operations, have been the primary users of the audit program. MPCA's audit policy permits companies to focus on a single set of environmental issues, or on any combination of their regulated activities. Until the mailing went out to auto-repair shops, roughly 74 percent of all the reports sent back to MPCA focused on underground tanks.[45] The next largest segment of the pie was for water quality point sources, which accounted for 22 reports or just over 7 percent of the total. Figure 2.1 shows the distribution of reports by program area as of June 1997.

The unevenness of the distribution among programs illuminates some of the reasons for the program's success. The staff responsible for underground storage tanks developed a self-inspection checklist that their constituents could use to determine if they were in compliance with state regulations. The tank checklist is a user-friendly series of nonthreatening yes/no questions that an owner-operator can answer without a lawyer or an engineer. The CFC checklist was much the same. MPCA's other permitting programs developed checklists and invited their permittees to use them for self-inspections, but the lists were not user friendly and have thus been less effective.

The tank program's approach has been friendly, supportive—and firm. An owner's attention is captured by a form letter that arrives by certified mail. The letter explains that a regional inspector will schedule a compliance inspection of an owner's tanks within the next six months *unless* the owner chooses to perform the self-audit program. The letter spells out the benefits of the alternative approach in bold print: "Violations disclosed and corrected as a result of a self-audit will not be subject to fines or other penalties."[46] The tank program staff has reinforced that message through numerous meetings and training sessions with trade associations.

FIGURE•2.1

Audit Program Users by Type of Program, June 1997



Tank owners continue to call, work their way through the checklist—sometimes with the direct assistance of a state inspector—report their findings, and correct noncompliances. Some of the owners now display green stars on their businesses. The process of reaching out to the tank owners and helping them with their inspections has changed the attitudes of inspectors and owners alike; many of the people quoted in the case study described the benefits of the cooperative approach the program fosters.

A mailing to the 4,400 auto body shops was different from the one to tank owners. It lacked any threat of an inspection, because MPCA feared that threatening to inspect auto body shops would swamp the agency with audit more responses than it could handle. It viewed the mailing as a controlled experiment to assess the factors that affect participation rates. The CFC mailing generated a much lower response rate than the tanks mailings.

The audit statute has not had much impact on printing, Minnesota's second largest industry, because 80 percent of the state's 1,600 printing businesses employ fewer than 25 people, and such small businesses have not yet felt the need to determine how well they are meeting state regulations. The environmental director of the Printing Industry of Minnesota, Inc., a trade association, estimated that only three to five percent of the small print shops in the state are in full compliance with regulations while perhaps 65 percent of the large companies are in compliance. Participation is low, the director said, because MPCA has not established a credible enforcement program. Printers have not received letters like those the MPCA sent to tank operators, and so most printers see the costs of hiring an auditor and correcting problems as high compared with the risk of state inspection. Some printers also remain distrustful of the state, fearing that they might be prosecuted for problems they might uncover in the audits.[47]

One of the state's largest printers, the John Roberts Company of Minneapolis, has taken the opposite approach and become a leader in the use of third-party audits as well as an advocate for environmental management systems. The company's environmental director notes that although the state's interest in environmental audits and self-inspections is compliance, a company's interest should be in improving its management and profitability. An environmental management system can help a firm by identifying opportunities for more

efficient uses of materials, waste reduction, process improvements, and pollution prevention.

The John Roberts official concurs with EPA and MPCA officials that the state—the public—cannot rely solely on self-audits, self-inspections, green stars, and corporate environmental management systems; the state still needs inspectors to look for violators. But what companies need are ongoing environmental management systems corroborated by both internal audits and regulatory inspections.[48]

MPCA has yet to complete any spot inspections of the firms submitting audit reports to verify their reliability. Nonetheless, the program managers conclude that the audit approach has greatly enhanced the impact of their inspection program. The credible threat of inspection that accompanies the tank program's letter appears to be a cost-effective tool to mobilize small businesses to comply with state regulations. The self-inspection materials the agency distributes encourage small firms to use the rudiments of an environmental management system.

One of the biggest and most influential advocates of environmental management systems is the International Standards Organization (ISO), a business organization created to facilitate world trade through the development of international standards ranging from the size of screw threads to determinations of product quality. Because of the importance which some businesses place on one another's environmental performance, ISO has worked over the last few years with companies and governments around the globe to develop a series of environmental standards known as ISO 14001. The standards are to include guidelines on how to conduct a product life-cycle analysis as well as guidelines for consistent environmental labeling. ISO 14001 defines an approach companies could take to monitor and manage their environmental impacts with an eye on improving efficiency, reducing waste generation and pollution, and reducing liabilities. A firm that meets the standards for ISO 14001 can become "ISO certified," much as a Minnesota firm might earn a green star.

EPA and several states have been working with businesses in numerous experiments to test ways the public might respond to the environmental management systems (EMS) of private firms. As American companies with international markets began to adopt the EMS approach recommended in ISO 14001, some public officials speculated that firms that would become ISO-certified through a third-party auditor might require little additional state or federal environmental supervision. Those firms might qualify for expedited permitting or looser reporting requirements that would reward—and encourage—their voluntary commitment to careful environmental management. Officials also wondered whether the ISO approach would provide sufficient public access to a firm's environmental data and whether ISO placed sufficient weight on determining whether a facility is in full compliance with environmental requirements. Because the ISO process seemed tailored to larger firms, officials also considered how to encourage smaller firms to adopt environmental management systems that would be useful and appropriate to their scale of operations.

EPA's Environmental Leadership Program explored some of those issues with a dozen firms and public facilities, including the John Roberts Company and released its benchmarks for evaluating environmental management systems in April 1997. Eleven states, including Minnesota, formed a working group to track EMS performance through a series of pilots, which are expected to run through 1998. In April 1997, EPA's Office of Water announced that it had awarded $100,000 grants to eight states to help them encourage corporate use of environmental management systems.[49]

The Massachusetts Department of Environmental Protection is working with EPA on a Project XL agreement that would allow the state to implement fully its Environmental Results Program, which for dry cleaners and photo processors could eventually replace ordinary

permits with self-certifications that facilities are meeting the state's "whole facility" operating criteria.

Thus through a variety of experiments, EPA, the private sector, and the public should learn more about the potential for firms to turn self-awareness into a public benefit.

Findings

2.11 A combination of technical assistance, forgiveness of past practices, and a credible threat of enforcement for any ongoing environmental violations can raise the level of environmental compliance among small businesses.

Minnesota's Environmental Improvement Act demonstrates that the ability to reach small businesses hinges on establishing the correct balance between enforcement and assistance. Without a credible threat of enforcement, there is little incentive for small businesses to invest in self-monitoring, let alone compliance. Without establishing an attitude of assistance and forgiveness, MPCA will be unable to win the trust of small business owners, and those owners will be unwilling to accept the technical assistance they need to identify and correct their problems. MPCA's strong education and outreach program has successfully linked those levers.

2.12 State and national programs can encourage firms of all sizes to invest in self-audits and environmental management systems. The Environmental Improvement Act appears to be a useful step towards a regulatory system in which most firms employ environmental management systems to ensure that they are in compliance and are taking advantage of pollution-prevention opportunities. The Minnesota program and others like it around the country are moving in a direction compatible with the ISO 14001 standards. The state's audit program appears more likely to reach smaller businesses than ISO and so meets an important need.

2.13 A regulatory system in which businesses largely self-certify their compliance requires a shift in how regulators, business managers, and the broader public view one another and their respective responsibilities. The Minnesota experience offers an example of steps that can foster such a change.

The Minnesota statute offers no guarantee of immunity or privilege, so when a company reports a regulatory violation it is taking a chance. Likewise, when MPCA programs reach out to encourage widespread use of the audit program, as the underground tank program has, regulators are taking a chance with their regulatees and the public: if firms abuse the trust MPCA is offering them, the public may react angrily to both. Minnesota is making the system work in part because the state has a long tradition of progressive government as well as an attitude of cooperation rather than antagonism.

Using the Power of Public Access to Information

Congress established a mandatory version of an environmental management system when it created the Toxics Release Inventory (TRI) as part of the Emergency Planning and Community Right-to-Know Act. While a firm designs an EMS to give managers the information they need to make better decisions for the company, TRI and comparable programs require firms to publish certain environmental emissions data, thus providing the public with information it can use to assess the firms' performance. Most observers conclude that public access to emissions data has created an incentive to firms to reduce their emissions of reportable toxics.

The apparent success of TRI in changing the environmental behavior of the firms covered by the program has led EPA and states to develop a wide range of programs requiring environmental reporting or labeling.[50] On April 22, 1997 (Earth Day), Vice President Al Gore announced that the administration would expand the coverage of TRI to seven industrial sectors previously exempted from toxics reporting: coal mining, metal mining, electric utilities, commercial hazardous waste treatment, petroleum bulk terminals, solvent recovery services, and chemical wholesalers.[51]

Some environmental groups continue to call on government to expand the concept of TRI by requiring firms to report publicly on all of the materials they use in their plants, whether they are ultimately released to the environment or not. Advocates believe that requirement would spur firms to reduce their use of all materials, particularly those that are especially hazardous. Industry representatives vehemently oppose the reporting as both unnecessary and a threat to their confidential business information.

States have adopted a variety of information-based tools to achieve environmental goals. As the federal government deregulates the electricity market, for example, New England states are working together to develop a mandatory reporting system for electric power producers and suppliers so that energy consumers will be able to make some assessments about the impact of their choices of suppliers. The coalition of states has yet to agree on what kind of information to require, or how to characterize the relative impacts of different sources of power, but several of the states have already passed legislation requiring electricity bills to include information about pricing and the type of fuel used to generate power.[52]

By linking price and environmental considerations, such disclosure bills underscore why governments find it useful to require firms to report environmental information. The market failures that environmental regulations are designed to correct include those created when the price of goods or services fails to embody all the environmental costs associated with the goods or services. Information about the source of their electricity can help consumers make a rough calculation about which supplies are, in fact, the best bargain. The emphasis here, however, must be on "rough," since most consumers are not equipped to compare the environmental impacts of hydroelectric generation with those of gas turbines or coal-fired boilers. Further, those who could make that comparison might choose the lowest-price option rather than the lowest-cost option if they perceived that their personal choice would have little impact on broader environmental conditions.

One of EPA's reinvention initiatives, the Sector Facility Indexing Project, is an attempt by EPA's Office of Enforcement and Compliance Assistance to combine numerous agency databases to produce useful profiles of all of the major facilities in five industrial sectors: automobile assembly, iron and steel, petroleum refining, primary nonferrous metals, and pulp mills. The project will not attempt to rank the facilities, but will provide information that would make comparisons of their relative environmental performance possible. The profiles will detail the following information about each facility: production or capacity; TRI releases; TRI releases weighted by toxicity factors (which are being reviewed by EPA's Science Advisory Board); inspection, compliance, and enforcement histories under the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act; and demographic data.[53]

FINDINGS

2.14 Using public access to information to encourage improved environmental performance has the advantage of being relatively easy to adopt politically, precisely because its

impact on markets—and hence, the environment—are indirect and unpredictable. Warning labels and the like may be highly effective and appropriate when risks associated with a product accrue only to the individual who uses it, but may be of little benefit if the risks fall more broadly. In contrast, information about environmental conditions that affect a broad range of people—TRI data or announcements that ambient air quality standards have been exceeded—is likely to help mobilize both individual and collective action.

2.15 The work on the Sector Facility Indexing Project moves forward one of the Academy's 1995 recommendations: to add risk-weighting factors to the Toxics Release Inventory. The lack of those factors has made the TRI an unnecessarily crude information tool. If the index distinguished between chemicals of high, medium, and low relative toxicity to humans and the environment, it would help focus on performance measures that matter to the public and would enable the public to send more appropriate signals to those responsible for the emissions. Even though TRI has been an incomplete data base, it has contributed to public discussions about risk and motivated private efforts to reduce emissions. EPA's use of the weighting factors in the Sector Facility Indexing Project offers an opportunity to learn how to improve TRI.

2.16 The Sector Facility Indexing Project represents a step forward in EPA's effort to synthesize and use the data it collects from numerous sources. The results should be useful to the firms themselves, to their communities, and to EPA and state regulators who, until now, have had few tools to help compare similar plants in different locations.

Summary Findings

This section of the report presents the Academy panel's crosscutting findings on the issues covered in Chapter 2. The case studies include additional findings pertaining to the specific cases.

2.A ***EPA is making progress in its efforts to reinvent its approach to regulation and environmental protection. The agency's experiments are providing information that will help the nation improve environmental protection at the national, state, and local level.***

Project XL is beginning to suggest that regulatory agencies and companies can agree on better ways to control and reduce environmental impacts, although the actual environmental and economic benefits remain to be seen. The flexibility in the Intel and Weyerhaeuser agreements should help the Chandler and Flint River plants do their work more efficiently, more cleanly, and at a potentially lower cost than their competitors. The public accountability measures should help communities track the firms' performance in ways they could not before. If those successes are repeated and amplified in subsequent XL agreements with companies, federal facilities, and communities, the nation could learn more of what it will need to make systemic improvements in regulatory programs.

The industry goals established by the metal finishers and their relevant stakeholders through the Common Sense Initiative have the potential to raise the industry's environmental performance without tightening the regulatory framework in which they operate.

Community-based environmental protection experiments are beginning to reveal how EPA can most effectively use its resources at the local level to protect ecosystems and other social values. By providing information and technical assistance, EPA builds problem solving

capacity in communities. By insisting that communities accept their responsibilities to prevent or remedy transboundary problems, EPA provides incentives for solving problems, and by working directly with the communities, EPA may help create atmospheres conducive to innovation.

EPA's efforts to encourage compliance by providing technical assistance to small businesses and supporting the use of environmental management systems and self-audits through the Environmental Leadership Program demonstrate the value of augmenting traditional enforcement tools. EPA is making a serious effort to develop new ways to measure compliance and the effectiveness of different types of enforcement and compliance-assistance approaches. The results of the effort should be an important management tool for federal, state, and local officials.

EPA's experience to date verifies the assumptions that underlie the reinvention initiatives. The Intel and Weyerhaeuser XL agreements showed that some firms would be willing to exceed regulatory requirements in exchange for flexibility that will improve their competitiveness in the marketplace. XL, CSI and community-based approaches show that taking an integrated approach to environmental protection can expand the range of socially desirable solutions to regulatory problems.

2.B *EPA's reinvention initiatives have yet to change the basic programs or attitudes of the agency.*

The sum of the reinvention efforts is positive but far from impressive. The Common Sense Initiative and Project XL have proved to be more complicated and frustrating than EPA had imagined. Neither has progressed as far or as fast as EPA had hoped at their inception. Neither has produced a bold "solution" to an environmental problem that can capture the public's imagination or ignite industry's enthusiasm. Rather, the two experiments have demonstrated that the search for "win-win" solutions is hard work.

Thus the vast majority of EPA's work and workers have been untouched by any of the reinvention initiatives. The rank-and-file EPA employee is skeptical, at best, of the initiatives. As the CSI study team noted: "While the media-based program offices participate in CSI, it is not their highest priority." The same is true of Project XL and the rest of the reinvention activities.

2.C *EPA's learn-as-it-goes approach to the reinvention initiatives has produced more frustration and disillusionment than necessary.*

The administration launched Project XL, CSI, and the performance partnership system with a rhetorical flourish, a set of broad goals, and loose guidelines, expecting that the lack of constraints would inspire creativity. The approach sought to counter the problems that arise from EPA's more traditional approach to developing programs or regulations: to work out all of the details in-house and then announce the package as a *fait accompli.* Too often, such a package would find few takers because its audience had had no role in its creation.

But EPA has not yet achieved the proper balance between those two extremes. The learn-as-it-goes technique has worked well for EPA in lower-profile initiatives, such as Design for Environment (a predecessor to CSI), the development of state and local comparative risk projects (described in the Academy's 1995 report), the development of environmental indicators at the state and local level, and the Environmental Leadership Program (which tested some of the self-certification and environmental management systems described above). But those initiatives were not born with such high expectations or conducted under such intense

scrutiny as XL and CSI. EPA had established systems to ensure that the agency and participants learned from one another as they went along. In contrast, Project XL and CSI have carried enormous political burdens because of their high-profile launchings. Many of the companies that responded to Project XL's call for applications had much grander expectations for what the project could deliver in terms of flexibility than EPA would eventually allow. The early lessons came at a substantial price, because EPA had not sufficiently thought through the programs or articulated their constraints.

The CSI evaluation team put it this way:

> "The current level of performance of the subcommittees was achieved at a high cost in time and frustration. This might not have been necessary if EPA had chosen to exercise more leadership and authority; on the other hand, if EPA had exercised too much control, the CSI goal would have been compromised. There is a very fine line between too much, too little, and the perfect degree of leadership and control—the lessons from the first two years will assist EPA in treading that line most effectively."

2.D ***The larger political context in which EPA operates inhibits reinvention and raises the cost of experimentation.***

Despite broad national support for environmental protection, the two national political parties, Congress, and the administration have largely polarized environmental policy. That polarization came to a head during the 103rd and 104th Congress. The legislative and budget struggles of 1993-1996 have left little trust between EPA and many members of Congress. Congress does not trust EPA to use discretion wisely; EPA's political leaders do not trust Congress to exercise its lawmaking responsibilities wisely.

In that climate, EPA has adopted two conservative approaches that reduce its exposure to congressional wrath: one, a reliance on "consensus" among stakeholders and two, a pattern of reforming its programs only to the extent that it can do so without congressional authorization.

EPA's embrace of stakeholders in the agency's deliberative processes is constructive. Members of the general public, people representing regulated industries or communities, state leaders, and environmental groups, among others, had found it difficult and frustrating to work with EPA in the regulatory development process, risk assessments, or policymaking. Their insistence on more involvement helped awaken EPA to the need to engage stakeholders and the general public in critical issues before it reached a decision. Such engagement helped EPA make better decisions and has significantly increased the political viability of some of those decisions.

In some of its reinvention initiatives and conventional operations, however, EPA seems reluctant to act without a consensus among the stakeholders. The CSI groups have proved frustrating because they could neither reach consensus nor get action on issues that fell just short of consensus. EPA often treats its own programs and regional offices as stakeholders, and the chronologies of many of the XL projects show the impact of extensive internal reviews, debates, and revisions.

EPA's enthusiasm for a consensus among stakeholders is counterproductive when it delays seemingly simple decisions, as it often has in Project XL. Those delays raise the cost of reinvention and lower its appeal to potential participants. EPA appears to be most cautious when the reinvention is most innovative—when statutory authority is least clear—and when a lack of consensus may result in litigation.

2.E ***Congress could create a climate for experimentation, evaluation, and learning. State legislatures can play a comparable role.***

Through formal and informal means, Congress can take steps to demonstrate to EPA and the regulated community that it wants to encourage risk-taking in the pursuit of better environmental management tools and a healthier environment. The most obvious steps Congress could take include authorizing reinvention experiments, such as Project XL, and appropriating funds to the efforts. At least as important, however, would be sharing responsibility for the experiments with EPA and tolerating the failures that are a necessary part of learning.

During the course of the Enterprise for the Environment's steering committee meetings, participants discussed the possibility of starting from scratch with a few companies to rethink how they might reduce the environmental impact of their materials purchases, manufacturing processes, distribution, and product disposal. The "blue sky" proposal caught the participants' imagination as a way to lift EPA's experimentation out of the real and imagined constraints of its current regulatory-enforcement models. For such a bold experiment to succeed, Congress would have to signal its willingness to let EPA proceed in a new direction.

Minnesota's Environmental Improvement Act and the Montana legislature's authorization of the Upper Clark Fork Steering Committee illustrate how a state legislature can help foster a climate for innovation.

2.F ***Market-based mechanisms for achieving environmental goals offer advantages over traditional command-and-control approaches.***

Most of the efforts described in this chapter attempt to improve the effectiveness or reduce the cost of traditional environmental regulatory approaches. They are valuable steps toward a more performance-based system. In some cases, however, employing market-based tools would be a more direct step, as EPA's experience with those approaches has indicated.

One could imagine using Project XL pilots or community-based techniques to find ways to encourage or reward energy efficiency in manufacturing, but such approaches would not make a dent in the nation's greenhouse gas emissions. A market-based mechanism such as a national tax on carbon, however, could be an effective catalyst for broad innovation and increased efficiency. By aligning the nation's environmental goals with its economic policies, tax policies, and expenditures, Congress would change the context in which firms and individuals make decisions, and the incentives would push them toward better environmental performance.

2.G ***Different problems require different tools: there is no single "best" approach.***

The simple phrase "environmental problems" may mask the diversity and complexity of the many different problems to which it refers, and hence falsely suggest there is a single best tool to address all the problems. The opposite is the case, making the task of selecting and implementing the most appropriate management tool a significant technical and political challenge. The same national cap-and-trade system that works so well for sulfur dioxide from utilities would be inappropriate for toxics, because it might create locally unacceptable hot spots.

2.H ***The agency has taken steps to learn from its reinvention experiments, but it has yet to establish a systematic approach to evaluation and program modification in response to its experience. That weakness is particularly troublesome in Project XL, which lacks a structured approach to turn the lessons of the pilots into regulatory reforms.***

2.I ***The further EPA and state and local environmental regulators move from traditional command-and-control regulation, the more important it will be to diversify the skills and backgrounds of their personnel.***

Designing and implementing market-based mechanisms, or other tools that offer choices to businesses, requires an interdisciplinary team that many environmental organizations—including many within businesses—lack. EPA will need more people with experience in multimedia pollution prevention, economists and others with business experience, and people skilled in alternative dispute resolution and public facilitation.

CASE STUDY • 3

Small Businesses Respond to Minnesota's Audit Program

Encouraging Small Businesses to Assume Environmental Responsibility

The Minnesota Legislature passed the Environmental Improvement Act[140] in 1995 to encourage companies to uncover and correct their violations of state environmental regulations. Small businesses are responding to the law's self-inspection incentives in ways that suggest that the state has found an effective tool for improving the environmental performance of small, dispersed sources of regulated pollutants.

The early success of the statute appears to depend on three related factors:

- The statute reduces company managers' fears that uncovering or reporting an environmental violation will leave them liable to legal actions and fines.
- The Minnesota Pollution Control Agency is trying to make it as simple as possible for small businesses to conduct self-audits or self-inspections that make them familiar with regulations and determine their compliance status.
- The agency is using the threat of traditional enforcement to remind small businesses and others that their choice is not between compliance and noncompliance but between a low-cost, low-stress, collaborative route to compliance on the one hand and fines, liability, and public notoriety on the other.

This case study focuses on how the Minnesota Pollution Control Agency (MPCA) and the Minnesota Office of the Attorney General have implemented the Environmental Improvement Act, seeking lessons about the role public agencies can play in encouraging firms to audit their own environmental performance. The case also considers how private actors, including trade associations, such as the Printing Industry of Minnesota, Inc., and the International Standards Organization, can strengthen their members' interest in environmental improvement. The case pays particular attention to small businesses, because they have frequently slipped through the regulatory net, though it also discusses the responses of larger businesses and public agencies to the state program.

Minnesota's "Environmental Improvement Act"

Minnesota was one of more than a dozen states that responded to a national business campaign in the mid-1990s for "audit privilege and immunity" legislation.

The act is a pilot program that will expire after four years. Lee Paddock, director of environmental policy in the Office of the Attorney General, remains one of the statute's key proponents. He explained that the authors gave the statute its four-year life span for two reasons: one, to give the regulated community an opportunity to test MPCA's commitment to the program and two, to make it clear to businesses that if they abused the public trust extended in the statute, the legislature could simply let the statute die.

The law is an attempt to remedy what many companies see as a disincentive to better management: the possibility that a company's own evaluation of its environmental performance could be either published by the state or used against it as evidence in a criminal or civil proceeding. National business organizations have argued that those possibilities encourage many executives to adopt a "what-we-don't-know-can't-hurt-us" attitude, even though such willful ignorance may cause environmental damage and perpetuate sloppy management. What was needed, those business groups argued, were state and federal statutes that would make internal environmental audit reports "privileged" information that public agencies and citizens would have no right to see—let alone use in an enforcement action—and a guarantee of immunity from prosecution for violations firms uncovered in audits and then fixed.

Minnesota rejected the call for strict privilege and immunity, however, and adopted legislation that differs in many important respects from those of other states. (For one thing, Minnesota's environmental organizations participated in its drafting and continue to support it. In many states, the opposite is true.) Rather than granting an evidentiary privilege, the statute protects privacy rights by requiring that participants in the program send in summaries of their audits, not the detailed audit reports themselves. Rather than granting immunity from prosecution or fines, the law defers enforcement and restricts sanctions, thus providing firms and public agencies with a reasonable expectation that if they act in good faith, the state will not punish them for uncovering environmental problems.

Specifically, the law directs the state not to penalize firms or public agencies for violations that they uncover during environmental audits or self-evaluations if they report the violations to the MPCA in writing and provide a schedule to eliminate them within 90 days.[141] The state retains the right to bring criminal actions against people who knowingly commit serious environmental crimes and to take civil or administrative action against repeat offenders or those who cause serious harm to public health or the environment. There are additional restrictions. No firm that has been fined for violations within the previous year may participate in the audit program. Larger firms applying for the program must also prepare a pollution-prevention plan and submit annual progress reports to qualify for the state deferment of enforcement.

The Minnesota statute is similar in most respects to the U.S. EPA's own policy on environmental audits,[142] which states that under most circumstances fines will be reduced or waived for firms that identify, self-report, and correct problems. EPA's Office of Enforcement and Compliance Assurance, however, does have several concerns with Minnesota's approach, according to Brian Riedel and Mimi Guernica of OECA's policy team. The state statute gives away one important enforcement lever which the EPA still holds: the potential to extract from a firm a fine equal to the economic benefits that it gained because of an environmental violation. (EPA's policy on economic gains treats large and small businesses differently. EPA seeks to recapture economic benefits from a small business only if its violation enabled it to

gain significant advantage over its competitors.) Paddock notes that the state developed its statute before EPA finalized its policy and that state policymakers will reexamine the economic-benefits provisions when the legislature considers reauthorizing the statute.

Guernica notes that OECA is also concerned about those areas in which Minnesota's law may diverge from the federal policy, limit the public's access to information, and constrain the state's ability to enforce federal laws.[143] As mentioned above, Minnesota's statute does not require firms to submit their complete environmental audits, only summary descriptions of violations they found. Although those summaries are in the public domain and may be used against firms in third-party suits, the statute protects the underlying audit reports from third-party access and thus denies citizens the right to see them or use them in a suit. The state, however, retains its rights to see the complete audit reports in the course of a formal investigation or prosecution. EPA objects to the limitation on third-party access and to several other provisions related to eligibility requirements. OECA has been far more critical of and outspoken about those state laws that have granted absolute privilege for audits or immunity to firms that find problems through audits.

It is beyond the scope of this case study to draw any conclusions about the relative effectiveness of those different approaches.

The Minnesota statute also authorized the MPCA to award a "green star" to any eligible company that completes the process of auditing, reporting, and fixing problems. Companies can display the star as a public sign of their commitment to environmental compliance. The drafters intended the green star program to be a commercially valuable incentive to persuade firms to join the program.

Implementation and Results

Minnesota's audit statute appears to be doing what its framers intended. As of April 25, 1997, the agency had sent approximately 700 audit packages to regulated entities and others and received 253 reports back.[144] In the two months that followed, MPCA mailed out 4,500 more packages, nearly all of them to auto body and auto repair shops handling regulated chlorofluorocarbons (CFCs) for air conditioners. Those mailings generated audit reports from 204 companies. As of June 25, 1997, MPCA had received a total of 515 reports, 511 of them from minor facilities. Approximately 75 percent of the reports identified problems that the respondents said they had either fixed or would correct.[145]

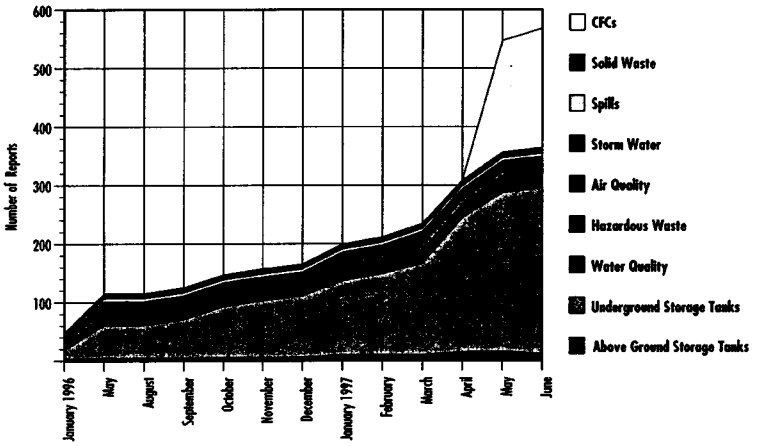
In its June 25, 1997, *Environmental Audit Program Update,* the agency noted: "No criminal violations have been identified in these reports, and no enforcement action has been taken against any of the participants." To the contrary, the agency had awarded 108 green stars to the participants and expected to issue 14 more soon.

As those statistics indicate, small businesses have been the primary users of the audit program, particularly those small businesses with underground storage tanks or CFC operations. MPCA's audit policy permits companies to examine a single set of environmental issues or any combination of their regulated activities. Thus two similar businesses might approach their audits very differently. One might focus only on its underground tanks, while the other might check compliance with regulations for tanks, air emissions, and hazardous waste management. Thus it is possible that a firm could earn a green star award for reporting and fixing an underground tank problem and still be in violation of water pollution regulations, though MPCA would not knowingly make such an award.

Until the mailing went out to auto repair shops, roughly 74 percent of all the reports sent back to MPCA focused on underground tanks.[146] The next largest response came from water

FIGURE• 1

GROWTH IN AUDIT REPORTS BY PROGRAM, JANUARY 1996-JUNE 1997



quality point sources, which accounted for 22 reports or just over 7 percent of the total. Figure 1 shows the growth of the program through June 1997 and the changes in the distribution of reports by program area.

The uneven distribution among programs, illustrated in Figure 1, and a series of field interviews with people participating in the audit program illuminate some of the reasons for the program's success. The MPCA staff has implemented the program as a pilot, complete with some controlled experiments that help explain why underground tanks account for such a large percentage of the audit reports.

One of the most impressive aspects of the audit program has been how thoughtfully managed and carefully documented the process has been. Randy Hukriede, MPCA's environmental audit program manager, has carefully tracked not only all of the applicants to the program but all the presentations the staff has given and all the information packets MPCA has mailed out. Some of the agency program staff have shown remarkable skill in using the audit program to further their programs' ultimate goals. Among the most entrepreneurial have been Edwin Balcos, the audit coordinator, and his colleagues in the Compliance and Assistance Unit of the Tanks and Emergency Response Section of MPCA.

Like many of their MPCA counterparts, the underground storage tanks staff developed a self-inspection checklist that their constituents could use to determine if they were in compliance with state regulations. The tank checklist is probably the most user friendly of all the lists, partly because tanks are relatively simple, but also because the staff made an effort to present the self-inspection process as a series of non-threatening yes/no questions that

owner-operators could answer without feeling that they needed lawyers and engineers at their sides. MPCA's other permitting programs developed checklists and invited their permittees to use them for self-inspections, but they were not as user friendly and have been less effective.

The tank program's approach has been friendly, supportive—and firm. The program's inspectors get the tank owners' attention with a certified letter that begins:

> As part of the Minnesota Pollution Control Agency (MPCA) Underground Storage Tank (UST) program, I will be inspecting the USTs at one or more of your UST facilities during the next six months . . . . The MPCA is giving you advance notice of our intent to inspect one or more of your UST facilities to give you the opportunity, if necessary, to bring your USTs into compliance.
>
> As an *alternative* to facility inspections, the MPCA has implemented a new self-audit program which enables owners of facilities which are subject to MPCA rules and/or permit requirements to self-evaluate their facilities to determine their state of compliance. If it is determined though the self-audit process that your facility is not in compliance with MPCA rules, you have 90 days from the date of submittal of your self-audit report to bring your facility into compliance. **Violations disclosed and corrected as a result of a self-audit will not be subject to fines or other penalties.** However, the amnesty provisions may not apply to businesses or organizations that have committed the same violation within the past year, or that are involved in criminal activities or other activities that cause serious harm to the environment or endanger public health. An easy-to-use checklist is available to assist you in the self-audit process. **If you would like more information about the self-audit program or wish to participate, please call me** . . . . [147]

Brian Williams, the manager of the Minneapolis Parks and Recreation Board's fleet of trucks and maintenance equipment made the letter work to the city's advantage. He had been aware that new regulations for the underground tanks would take effect in 1998, so had signed up for an MPCA class on tank management. There he learned about the new audit program. He asked his supervisors if he could conduct a self-audit of the 14 board-owned tanks that his 200-vehicle fleet used to refuel at various points around the city. They were afraid of the cost of fixing any problems, however, and it was not until he received the letter that he was able to convince them.

He filled in the 20-page form for each of the tanks, a task that took a tremendous amount of time—mostly because there were no records on the older tanks. Williams found some problems: the maintenance crew was not testing each tank for leaks every day, and one tank seemed to have leaked. Williams worked with MPCA on a corrective action plan that would remove or replace all of the underground tanks, and fuel most of the fleet through pumps maintained by the city of Minneapolis. MPCA gave the board three months to fix the problems and granted a short extension when Williams asked for it.

Williams described working with MPCA as a pleasure, and noted the effectiveness of each part of the audit program. The initial class was helpful in making Williams aware of his responsibilities for tank management, though the enforcement notice was the key to mobilizing the self-inspection and subsequent investment. Without the audit program's waiving of penalties, "I think we'd be broke," Williams said. He has become an advocate for self-inspections and reporting: "I think everybody should do it."

SuperValu is a large food warehouse and distribution facility in the Minneapolis suburb of Hopkins. The facility comes under environmental regulation because of the large size of its heating equipment, a number of petroleum storage tanks, and its fleet maintenance operations. Bob King, the firm's environment and safety compliance officer, said that managers became interested in participating in the environmental audit program after an MPCA employee told them about it. When they read the audit forms, and discovered that the audit provided protection against penalties for violations revealed in the audit, they decided immediately to choose audit over inspection.

King said that conducting the self-inspection required only slightly more work than SuperValu would have devoted to prepare for a routine state environmental compliance inspection. Although he did have to hire a consultant to inspect the facility's electronic monitoring equipment, the company's staff were able to perform more than 90 percent of the self-inspection without any outside assistance.

King's overall impression of the audit process was very favorable, as were his views of the MPCA staff with whom he worked. The only problem was that not all of his environmental compliance activities could be included in the audit. The Minnesota statute defers to EPA's audit policy on the critical issue of statutorily mandated reporting. EPA will not forgive any violations of reporting requirements, and Minnesota's statute is consistent with EPA on this point, effectively removing many air pollution sources from the program, because their permits require them to monitor and report on their emissions. MPCA considers those emissions reports "unauditable."

Both the Minneapolis Parks and Recreation Board and SuperValu are well-established operations with employees who specialize in environmental management. Jerry Koschney, the owner-operator of Don's Apache Auto Wash in Minneapolis, had fewer resources to draw on when he encountered the new state program. Koschney gave a decidedly mixed review of his experience in performing a self-inspection of his underground gasoline storage tanks.

Koschney knows how to manage a gasoline station and a car wash, but he is not a regulatory compliance professional. To him the forms were difficult, hard to follow, and time consuming. Part of his difficulty was in getting quick answers from the MPCA staff members who were to provide him with technical assistance. He put that down to the fact that the most knowledgeable people at MPCA were often in the field, not at their desks.

Koschney concluded that the self-inspection was more complicated and troublesome than an agency inspection would have been. He thought that a well qualified inspector could perform an inspection with an owner-operator in much less time than the two weeks the process took him. He suggested that the MPCA develop a self-inspection form specifically for gasoline station owners so they would not have to deal with an all-purpose form.

As far as the MPCA staff were concerned, Koschney had few complaints other than their unavailability at times. He noted that there has been a major change in the attitudes of agency staff. In recent years, they have tried to learn about his business and work with him to ensure compliance. Ten years ago, he said, staff arrogantly attempted to demonstrate their power and technical knowledge and showed little concern for the problems of those they were regulating.

Koschney likened the green star award to a grade-school gold star. He wanted to do the right thing because of his concern for the environment, not to get an award. Nevertheless, Koschney posted the green star decal on his station's front door and proudly stated that a customer had written him a note praising him for his concern for the environment.

Tom Nyberg, owner of Christy's Auto Service, a family-owned-and-operated auto repair shop, was one of the first to work his way through the first phases of the audit process. Nyberg

had inherited the business from his father and was completely unfamiliar with the many environmental regulations affecting his business. He learned of the environmental audit program when he called the MPCA for information about his regulatory responsibilities. That first encounter with the agency staff was rather difficult, because the regulators could not believe that Nyberg understood so little about environmental regulation. Over time, however, Nyberg and the MPCA staff developed a good working relationship. After working with them for a year, Nyberg had high praise for their initiative and helpfulness.

He concluded that the self-inspection forms were too complex and should be redrafted specifically for service stations. Since support from the agency helped get him through the process, he wondered how businesses in rural areas could comply without being close to an MPCA office.

Minnesota's Printers: Mixed Results

The Minnesota audit statute is in many ways the result of a series of negotiations and agreements initiated by the Printing Industry of Minnesota, Inc. (PIM), a 300-member trade association based in Minneapolis. Despite their leadership in developing the statute, however, printers have not rushed to use it. That is probably because while printing is Minnesota's second-largest industry, roughly 80 percent of the state's 1,600 printing companies employ fewer than 25 people. Those small businesses have not yet felt a need to determine how well they are meeting the state's regulations.

Since 1989, Scott Schuler, PIM's environmental director has been working to get across to members the power of environmental auditing as a business tool. He estimates that only 3 to 5 percent of the small print shops in the state are in full compliance with regulations and that perhaps 65 percent of the large companies are in compliance.[148] At the same time as he brought his members into compliance, he wanted to persuade MPCA to reward companies for improving their environmental management tools. As a result of his efforts, Schuler, MPCA, and the attorney general's office signed a partnership agreement in January 1993 that contained most of the policies of the later Environmental Improvement Act.

That agreement formalized what had been informal MPCA policy for some years. The central element was a promise from MPCA to use its discretion to reduce or waive penalties when printers found environmental problems and fixed them themselves. Although the printers initially wanted a promise of immunity from prosecution for self-reported violations, the state government refused to include that pledge in the agreement. The Minnesota Chamber of Commerce supported the agreement and began to push for legislation that would extend the same policies to all businesses. It also advocated for immunity, but, like the legislature later, state officials did not grant it.

Part of the agreement was PIM's commitment to promote environmental compliance throughout the industry, a task it began by focusing on environmental audits. PIM hired a skilled environmental auditor to work for the members through a new for-profit environmental audit business which charged members $1,200 for an audit. MPCA's Office of Environmental Assistance offered small printing companies $600 toward that cost.

The PIM auditor does a complete evaluation of all a company's environmental, safety, and health systems, and thus his report is far more comprehensive than the single program self-inspections described above. It is also more reliable, because it is prepared by a specialist. The auditor submits his full report to the company, and the company submits to PIM its plan for correcting any compliance problems. PIM then takes on an enforcement role by holding the company to its plan. If a company does not comply, PIM throws it out of the agreement

program. Before the audit statute became law, that entire audit and corrections process happened entirely outside the normal regulatory channels. PIM would not send MPCA lists of companies involved in the plan, nor would the companies necessarily report violations or correction plans to MPCA. If an MPCA inspector arrived at a printer's shop, though, the company would let MPCA know that it was working under the agreement.

The biggest problems the PIM auditor has found include one company that had never applied for an air pollution permit and some violations of hazardous-waste storage, inspection, and labeling regulations.

PIM's auditor has yet to break even, however. As of January 1997, only 60 companies had used the auditing program, and most of those were larger firms. Only 15 companies had asked for the $600 state audit subsidy, leaving much of the available fund untouched.

Participation is low, Schuler said, because most printers see the costs of hiring the auditor and correcting problems as high compared with the low risk of being inspected by the state. Some printers also remain distrustful of the state, fearing that without immunity they might be prosecuted, or finding the penalty-reduction promise vague or inadequate. Some printers also feel that PIM's work with MPCA has resulted in a cooperative alliance that further reduces the likelihood that MPCA will inspect them. Schuler said that the state needs to use its enforcement stick for the carrots to have much value as incentives. The state's air program inspectors, for example, have not sent printers inspection letters comparable to those the tank inspectors sent to operators.

MPCA sets the context in which firms make regulatory decisions, and that context is not yet sending all the right signals. Schuler said that firms that complete a self-inspection may develop a false sense of security, believing that they are in compliance and thus unlikely to face state sanctions, even if they have actually missed some important compliance problems. The potential value of the third-party audit approach PIM has established is weakened by the loose rules applying to the green star program. The green star is not yet the valuable business asset it should be, Schuler said, in part because MPCA awards them to firms for complying with only a single set of rules, rather than for having demonstrated comprehensive compliance. Schuler envisions the day when green stars will have such credibility in the marketplace that customers will purchase goods and services only from firms that have earned them.

Although the state's interest in environmental audits and self-inspections is compliance, the companies' interest should be in improving their management and profitability, according to Jeffrey Adrian, environmental director of the John Roberts Company, a large Minneapolis printing operation that grosses $55 million in annual sales and employs some 330 people. The company has been active in state and national efforts to improve environmental management, participating in several EPA programs: Design for the Environment, the 33/50 program, the Common Sense Initiative, and the Environmental Leadership Program.

John Roberts decided to use the PIM audit in 1994, Adrian said, because it makes business sense by helping the company reduce its use of materials and waste management costs. Companies should be building environmental management systems that will help them spot opportunities for process improvements and pollution prevention, Adrian believes, rather than worrying solely about strict compliance. John Roberts has developed such a system. "I want to know if I have a system in place that will find the real issues," he said, "not just the housekeeping items like a missing bung on a drum."

As part of its involvement in EPA's Environmental Leadership Program, John Roberts had the PIM auditor do a complete audit of the plant in 1996 while EPA and MPCA inspec-

tors watched. The auditor sent Adrian his report, which included recommendations to fix three problems. Adrian responded to PIM with a compliance plan. Then John Roberts had to decide if it would send a summary of the audit report and compliance plan in to MPCA as an application for a green star. Adrian said he told the CEO to do it, to be open with the agency and the public despite the small risk of being held up as a "gotcha example" by regulators. The CEO concurred. Adrian notes that some companies are afraid to take that action because they fear that they will set themselves up for overzealous regulators eager to create the deterrence that can come from a few examples of vigorous enforcement.

Adrian agreed with the EPA and MPCA inspectors who told him they are uncomfortable relying solely on self-audits and self-inspections. Adrian told them that the state still needs its inspectors to look for violators, but what companies need are ongoing environmental management systems corroborated by both internal audits and regulatory inspections.[149]

The MPCA Gets More Bang for its Buck

The MPCA's approach to the audit statute is part of a broader effort to change the relationship between the state agency and the regulated community. Starting under Commissioner Chuck Williams and continued by his successor, Peder Larson, MPCA has tried to replace the adversarial nature of the relationship with one of cooperation. MPCA employees are now reminded that they don't "do" environmental protection; rather, they help businesses and citizens do their parts. For example, MPCA's hazardous-waste program inspectors often find complaints about potential violations unfounded. To turn those inspections into a positive experience for the regulated party, the inspectors are now taking an owner around his site with a self-inspection checklist. Together, they document the site's compliance, and the inspector urges the owner to submit the results to the agency as a part of the audit program. The initiative is intended to get owners in the habit of self-inspection.

Balcos and the other entrepreneurs in the tanks program have fostered that shift in agency focus. They have also increased the effectiveness of their inspection powers. In FY 1996, the tanks office staff inspected 40 operating facilities.[150] In the first half of FY 1997, some 90 tank owners responded to the outreach and inspection letters with self-inspection reports and compliance schedules. Even if the self-inspections are somewhat less rigorous than the agency's traditional inspections, the increase in coverage appears to be a large gain. There are thousands of underground tanks in Minnesota that the agency has never inspected—and probably never will. Nor has the agency ever conducted follow-up inspections to ensure continued compliance. Thus, without significantly increasing the historically low-level of state inspection activity, the audit program has inspired more self-inspections.

MPCA programs regulating waste combusters and CFCs have recently adopted the tanks program's approach, and other programs are considering the action. Air pollution officials, for example, sent letters to the owners of 4,400 auto-body and repair shops notifying them of the audit program and urging them to use an enclosed self-inspection check-list. Out of fear of swamping the agency with too many responses, however, the officials did *not* threaten to inspect the operations. The results are visible in Figure 1, above: 204 firms responded with audit reports. Although those reports are a substantial subset of all the reports filed with MPCA, the 4.6 percent response rate is far lower than the tanks program's. That indicates that the agency was correct in assuming that a credible threat of enforcement generates much stronger participation in the audit program.

Resource constraints do limit the effectiveness of the audit program, as the slow responses to the nonthreatening letters to auto body operators and the printers illustrate. Where en-

forcement pressure is weak, response is weak. To maintain the credibility of the audit program, state officials note that they must check soon on how participants are implementing their compliance plans, but that too is constrained by resources. Lee Paddock said that the legislature insisted that MPCA implement the program with no new money, so the agency started work with the equivalent of two full-time employees. As the program picked up momentum, some program offices have directed additional staff to work on the effort as part of their regular duties. State officials have not attempted to measure the actual environmental impact of the statute and the self-inspection reports.

Paddock and others are already focusing on how to improve the program through reauthorizing legislation in 1999. Paddock hopes to strengthen the green star program by making it a demonstration of multimedia compliance. He is also looking for ways to extend the program's coverage to areas now considered unauditable.

CONCLUSIONS

1. ***Minnesota's Environmental Improvement Act is working, and it is particularly successful at reaching those small businesses which have gone relatively unregulated in the past.***

The response of underground tank owners to the program appears to be a model for how the statute can operate when other MPCA programs copy the techniques of the tank program. Bringing the printers into the process should be relatively easy, given the groundwork that the PIM leaders have already laid. It is likely that the statute will enable MPCA's enforcement dollars to go farther, as each inspection letter and actual inspection increases its impact on members of the regulated community. It is impossible to determine at this point, however, whether the new approach is more cost effective than a hard-line enforcement program without all the outreach and assistance. State agencies across the country have been slow to enforce against small businesses because of high transaction costs and a high political price. Minnesota's approach appears to be a positive way around that old problem and a tool to build a social expectation of compliance.

2. ***Minnesota's Environmental Improvement Act demonstrates that the ability to reach small businesses hinges on establishing the correct balance between enforcement and assistance.***

Without maintaining a credible threat of enforcement, MPCA lacks the leverage to get small businesses to invest in self-monitoring, let alone compliance. Without establishing an attitude of assistance and forgiveness, MPCA will be unable to win the trust of small-business owners, and those owners will be unwilling to accept the technical assistance they need to identify and correct their problems. MPCA's strong education and outreach program has successfully linked those levers. The agency has helped raise the regulated community's interest in environmental compliance audits. The tanks program staff has taken that outreach effort further by assisting many of the tank owners with their self-inspections and by providing enough follow-up to be confident that the audit reports are accurate.

To make the system even more credible, MPCA must begin conducting spot checks of firms submitting audit and self-inspection reports to determine if companies are doing a sufficiently good job on their self-inspections and corrective action and to demonstrate the

risk of false reporting. Of course, the agency also needs to make regular inspections of facilities that have not participated in the self-inspection program and to ensure that its entire regulatory program is credible.

Because the act's supporters know that they will have to go through reauthorization in just a few years, MPCA is aggressively monitoring and documenting the program's implementation. At the end of the first full year of the statute's life, Hukriede sent surveys to 382 people on the program's mailing list and received written responses from 187 of them, a 49 percent return rate. A summary of the results is in an attachment to this case.

Of the 114 regulated businesses responding to the survey, 40 had participated in the audit program, 15 said they intended to, and 59 said they had not participated. The primary incentives that had led the 40 firms to participate included: "to verify compliance with environmental laws" (35 checks), "opportunity to correct violations without enforcement" (31 checks), and "avoid possible future cleanup costs" (14 checks). Ten respondents checked "being able to display a green star."

The top disincentive cited by those who had not participated was "concern about EPA taking enforcement action" (23 checks), followed by no time (20 checks), no money (19 checks) and lack of incentives (12 checks). Only three said the "cost of corrective action" was a disincentive.

All 114 of the business respondents—including those without the time or money—answered "yes" to the question, "Do you routinely check your facility for compliance with environmental laws?" And 88 respondents said they "would recommend to others that they participate in the environmental auditing program." Five said "maybe" and nine didn't answer. Only 12 respondents said they would recommend against participation. Apparently many respondents felt that *other* companies should take risks and use resources they were not willing to themselves. In environmental regulatory theory, a free rider is someone who watches other people or firms reduce their environmental pollution while continuing to pollute himself, thus getting a cleaner environment with no personal effort. The survey results suggest that free riders are alive and well and living in Minnesota. Those firms that did not participate in the program, but wish others to do so, may also hope that the program will continue to reduce the adversarial nature of the regulatory process, thus reducing the chance that agencies will either inspect them or use the tools of enforcement to move them into compliance.

3. *The Minnesota statute appears to have struck a useful balance between the public's need to hold businesses accountable for their performance and businesses' desire for certainty that they will not be devastated by acknowledging noncompliance.*

The statute and MPCA require firms to submit only a summary of their self-inspections and the problems they uncover, and thus provide companies with a veil of privacy that some may abuse. In their submissions to the state, however, company presidents and general managers sign their names to letters acknowledging compliance problems and pledging to correct them.[151] Some of the people writing to the regulators also ask for additional advice on how to manage their problems. The letters are impressive in their seriousness of purpose. A skeptic could read them and wonder if the authors really understood all of the statutes and regulations to which they promised to adhere, yet would probably concede that the people signing the letters were sincerely pledging to fix the problems they had identified.

4. ***Minnesota needs to give more credibility and publicity to the green star award if it is to become a useful incentive for businesses to comply with statutes and improve their environmental performance.***

The green star must have meaning to a firm's customers before it becomes an incentive for that firm. State agencies can add to the star's value by publicizing the program directly to consumers of services like gas stations and print shops. MPCA is beginning that campaign by posting a list of the green star companies on its web page, along with information sheets and self-inspection forms to help other companies get started in the program. The state could also make a green star a factor in its procurement of commodities, goods, and services.

If it reauthorizes the statute, the legislature should make the green star available only to those firms that do a complete, multimedia environmental audit or inspection. The more a green star means, the better the program will work.

5. ***The Environmental Improvement Act appears to be a useful step towards a regulatory system in which most firms employ environmental management systems to ensure that they are in compliance and taking advantage of pollution-prevention opportunities.***

As the John Roberts example illustrates, many companies could improve their competitive position by investing more in environmental programs that will reduce their production and emissions of pollutants. The audit statute may encourage even relatively small firms to begin to build those systems. As more and more firms do so, not only will the environment improve, but state regulatory programs will be able to focus more of their attention on a smaller number of free riders and bad actors.

The Minnesota program and others like it around the country are moving in a direction compatible with the ISO 14000 standards.[152] The state's audit program appears more likely to reach smaller businesses than ISO, and so meets an important need.

6. ***The Minnesota experience illustrates that a regulatory system in which businesses largely self-certify their compliance requires a cultural shift among regulators, business managers, and the broader public.***

Remember that the Minnesota statute offers no guarantee of immunity or privilege, so whenever a company reports a regulatory violation, it is taking a chance with regulators and the public. Likewise, when MPCA programs reach out—as the underground tank program has—to encourage widespread use of the audit program, MPCA regulators are taking a chance with their regulatees and the public. Minnesota is making the system work in part because the state has a long tradition of progressive government, not to mention "Minnesota Nice," an attitude of cooperation rather than antagonism. Nevertheless, MPCA, the regulated community, and Minnesotans appear only partly prepared to make the audit system work. The leaders in government and the private sector identified in this case are helping Minnesota make the new system work and are breaking a path for other states.

ATTACHMENT

Environmental Auditing in Minnesota Customer Survey

The Minnesota Pollution Control Agency surveyed some of its clients about their response to the state's environmental auditing program. The department compiled the following data from the responses received as of April 28, 1997. The department had mailed surveys to 382 parties and had received 187 responses, a 49 percent response rate.

You have been selected to participate in this survey because, during the past year, you requested information about the Environmental Improvement Pilot Project, also known as the Environmental Auditing Program. Please take a few minutes to complete this survey and return it to the Minnesota Pollution Control Agency in the enclosed self-addressed stamped envelope. The information we obtain from this survey will help us make additional improvements to the Environmental Auditing Program. Please return this survey by January 10, 1997. Thank you for your participation.

1. Which of the following categories best describes your organization?

	Regulated Business	Consulting	Government Units*	Law Offices
Total of 183 Responses	114	40	23	5

2. How did you hear about the Environmental Auditing Program?

	Regulated Business	Consulting	Government Units*	Law Offices
MPCA-Sponsored Training Session	19	5	10	0
Through Routine Contact with MPCA Staff	28	12	4	2
MPCA Presentation	14	5	1	1
MPCA Newsletter	57	19	8	2
Trade Association Publication	22	4	1	2
Newspaper Article	2	0	0	1
Other Publication	5	2	1	0
Consulting Firm	4	2	0	0
Legal Representative	0	0	0	0
Other	3	5	0	3

3. Did you, or your client, participate in the Environmental Auditing Program?

	Regulated Business	Consulting	Government Units*	Law Offices
"Yes" (go to Question 4)	40	10	6	2
"No" (Go to Question 5)	59	21	10	3
"No, but I/my client intend to"	15	9	6	0

4. If you answered 'yes' to question 3, what was your incentive for participating in the Environmental Auditing Program? Please check all that apply.

	Regulated Business	Consulting	Government Units*	Law Offices
Opportunity to Correct Violations Without Enforcement	31	9	6	1
Being Able to Display a "Green Star" Award at Facility	10	2	2	0
Offered Audit in Lieu of Underground Tanks Inspection	9	3	2	0
To Verify Compliance with Environmental Laws	35	8	5	2
Advice of Attorney	0	0	0	0
Avoid possible Future Cleanup Costs	14	4	1	0
Reduce Cost of Business Insurance	3	0	0	0
Ensure Resale Value of Property	5	1	0	0
Other	0	0	1	0

5. If you answered 'No' to question 3, which of the following was a reason you, or your client, chose not to participate? Please check all that apply.

	Regulated Business	Consulting	Government Units*	Law Offices
Auditing Checklists Were Too Complicatwd	8	2	0	0
No Time to Devote to Auditing	20	8	5	0
Lack of Internal Resources	19	5	2	0

Lack of Incentives	12	6	1	1
No Support From Management	3	7	1	0
Concern About EPA Taking Enforcement Action	23	7	1	2
Advice of Attorney	7	1	1	0
Cost of Corrective Action	3	2	0	0
Violations Found Were Excluded From Audit Program	1	1	0	0
Don't Trust the MPCA	7	2	1	0
Other (Please Specify)	29	13	8	2

8. Do you routinely check your facility for compliance with environmental laws?

	Regulated Business	Consulting	Government Units*	Law Offices
"Yes"	114	16	21	1
"No"	0	3	1	0
Not Applicable		18	1	3

9. Would you recommend to others that they participate in the Environmental Auditing Program?

	Regulated Business	Consulting	Government Units*	Law Offices
"Yes"	88	31	21	3
"No"	12	3	1	1
"Maybe"	5	2	1	1

*Minnesota Only

INTERTANKO
THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS
- FOR SAFE TRANSPORT, CLEANER SEAS AND FREE COMPETITION -

FROM THE OFFICE OF THE CHAIRMAN
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November 4, 1997

The Honorable John H. Chafee
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510-6175

Re: Environmental Protection Partnership Act (S.866)

Dear Chairman Chafee:

The International Association of Independent Tanker Owners ("INTERTANKO") represents 500 members and associate members engaged in the transport of oil and chemical cargoes throughout the world. INTERTANKO's members are based in almost forty countries, including the United States. INTERTANKO members own or operate 150 million deadweight tons of tanker tonnage consisting of approximately 1,700 tankers. Nearly sixty percent of the United States' oil imports are transported by INTERTANKO-member companies and a vast majority of the bulk chemical exported from the United States are transported by INTERTANKO members.

INTERTANKO has a keen interest in the Environmental Protection Partnership ACT (S.866) and strongly supports it. The reason is quite simple: privilege and immunity laws encourage honest self-assessments and the correction of compliance problems by companies on their own initiative. S. 866 recognizes that industry self-policing is the most effective method of ensuring compliance with applicable safety and environmental laws and that punitive measures to enforce such laws should only be used as a last resort.

However, INTERTANKO has one recommendation: that the scope of this bill expressly include audits conducted under the International Safety Management (ISM) Code. The ISM Code is an international requirement being implemented by the U.S. Coast Guard which compels shipowners to have definitive safety and environmental management programs. The ISM Code takes effect on July 1, 1998.

The ISM Code program requires an elaborate system of internal audits. These audits are expected to generate an enormous volume of documentation concerning a company's or vessel's compliance (or lack thereof) with applicable safety and environmental requirements. While audits encourage compliance with applicable

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standards, they also provide indications of past non-conformities. This evidence may be used against a ship owner or operator by governmental agencies as well as provide fodder for any litigation that arises after a mishap.

INTERTANKO applauds your efforts on this legislation. We strongly support S. 866 and recommend that it specifically address ISM Code audits. Audits should be used to provide an accurate self-assessment of a company's compliance with various safety and environmental standards and point the way to better compliance. Audits should be used to determine corrective actions to ensure that a company meets applicable standards. Audit results should not be used by government agencies to assess penalties against a company. Such an approach threatens the accuracy and objectivity of internal audits.

Sincerely,

Richard T. du Moulin

Richard T. du Moulin
Chairman

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